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Supreme Court, U.S.
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No.

# In the Supreme Court of the United States

**Term, 1994**

MARY C. MILLER, Administratrix of the Estate of JOHN R. MILLER, Deceased and all others similarly situated,

*Petitioners*

vs.

KEYSTONE INSURANCE COMPANY,

*Respondent*

**Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania**

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## STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

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Does a State Supreme Court violate fundamental Rule of Law and *stare decisis* principles underlying the integrity of a constitutional system of government when it overturns years of precedent during a time when a prior three-Justice Minority temporarily becomes a three-Justice Majority in a term when two Justices are absent?

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# 1
## *Parties to the Proceedings*

## PARTIES TO THE PROCEEDINGS

The only parties to the proceedings are those appearing in the caption of the case.

## CONSTITUTIONALITY OF A STATE OR FEDERAL STATUTE

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The instant Petition for Certiorari does not attack the constitutionality of a state or federal statute, but rather, attacks the constitutionality of the conduct of a temporary three-Justice Majority of the Pennsylvania Supreme Court.

## REFERENCE TO OPINIONS DELIVERED IN THE COURTS BELOW

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The Pennsylvania Supreme Court denied plaintiffs' Application for Reargument on April 29, 1994 and the Order was entered on May 2, 1994. A copy of the Order is attached as an Exhibit (App. 1a).

On January 31, 1994 the Pennsylvania Supreme Court entered the following Judgment:

> "The Order of Superior Court vacating the Order of the trial court is reversed and the Order of the Court of Common Pleas for Dauphin County granting Appellant's motion for Summary Judgment on June 2, 1989, is reinstated.
>
> Mr. Justice Larsen *did not participate* in the consideration or decision of this case.
>
> Mr. Justice McDermott *did not participate* in the decision of this case.
>
> Mr. Justice Cappy files a Dissenting Opinion in which Mr. Justice Papadakos joins.
>
> DATED: JANUARY 31, 1994
> JUDGMENT ENTERED:
> /a/Shirley Bailey
> CHIEF CLERK"

(Emphasis supplied)

A copy of the Court's Opinion dated January 31, 1994, is attached as an Exhibit (App. 2a).

A copy of the Superior Court's Decision dated January 8, 1991, reported at 402 Pa. Superior Ct. 213, 586 A.2d 936

(1991) is attached as an Exhibit (App. 20a); the Trial Court's Opinion and Orders dated May 16, 1989, is attached as an Exhibit (App. 57a).

A copy of *Dercoli v. Pennsylvania Nat. Mut. Ins. Co.*, 520 Pa. 471, 554 A.2d 906 (1989) is attached as an Exhibit (App. 73a).

## STATEMENT OF JURISDICTION

The United States Supreme Court is vested with jurisdiction over this matter pursuant to 28 U.S.C. §1257(a) which sets forth the requirements for review by Writ of Certiorari. Also, pursuant to Supreme Court Rule 10.1 and the powers invested by the United States Constitution, the Supreme Court has broad discretion to consider matters which affect a constitutional system of government.

## RELEVANT STATUTES AND ORDINANCES INVOLVED

---

Pennsylvania's now-repealed No-Fault Motor Vehicle Insurance Act, 40 P.S. §1009.101 *et seq.*:

(a) Findings—

• • •

(3) the maximum feasible restoration of all individuals injured and compensation of the economic losses of the survivors of all individuals killed ... .

• • •

(5) exhaustive studies ... have determined that the present basic system of motor vehicle accident and insurance law ... is not such a low-cost, comprehensive, and fair system;

(6) careful studies ... have demonstrated that a basic system ... which:

(A) assures every victim payment of all his basic medical and rehabilitation costs, and recovery of a reasonable amount of work loss ... is such a low-cost ... system;

• • •

(b) Purposes—

Therefore, it is hereby declared to be the policy of the General Assembly to establish ... a Statewide system of prompt and adequate basic loss benefits for motor vehicle accident victims and the survivors of deceased victims.

40 P.S. §1009.102.

Pennsylvania Insurance Department Regulations:

C. LAWSUITS.

You will not need a lawyer to collect your No-Fault benefits. If you are injured, [contact your insurance company or your insurance agent] to get claims forms. You should be paid within 30 days after the company receives completed forms from all related parties (you, your employer, the hospital, etc.).

31 Pa. Code §66.4, Transition Procedures.

## CONCISE STATEMENT OF THE CASE

In 1980, Keystone received premiums from the Millers and, in return, promised to pay the no-fault benefits to which they were entitled. The Pennsylvania Supreme Court unanimously decided *Heffner v. Allstate Insurance Co.*, 265 Pa. Superior Ct. 181, 401 A.2d 1160 (1979), *aff'd* 491 Pa. 447, 421 A.2d 629 (1980), and *Pontius v. U.S.F.&G.*, No. 2702 S 1077 (C.P. Dauph.), *reversed* by the Superior Court to No. 80 March Term, 1978 (unreported), *aff'd* 491 Pa. 447, 421 A.2d 629 (1980), holding that dependent survivors were entitled to receive post-mortem work loss benefits. Mr. Miller died and Mrs. Miller was determined to be a dependent survivor. She filed a claim form that said Keystone would pay the no-fault benefits to which she was entitled. Knowing from *Heffner, Pontius* and *Nye v. Erie Ins. Exchange*, No. 5349 S 1979 (C.P. Dauph.), 307 Pa. Superior Ct. 464, 453 A.2d 677 (1982), *reversed in part, affirmed in part*, 504 Pa. 3, 470 A.2d 98 (1983), that Mrs. Miller was entitled to post-mortem work loss benefits, Keystone chose as its corporate policy *not* to pay same unless specifically requested and *not* to tell insureds of their entitlement. Keystone closed its file, waited four years and claimed the statute of limitations as a defense.

Prior to the instant action, it had long been the law in Pennsylvania that insurers had affirmative duties of good faith and fair dealing towards their own insureds. The Pennsylvania Supreme Court, by ignoring years of precedent, the Rule of Law, and the doctrine of *stare decisis*, sanctioned Keystone's conduct during a period when two Justices who had helped to clarify the good faith obligations an insurer has towards its insureds were absent from the bench.

This conduct relates to the very notion of the Rule of Law which is at the base of our constitutional system of government.

## ARGUMENT

### A. Principle Of Stare Decisis

The Pennsylvania Supreme Court, in ignoring long-established precedent by ruling that an insurer has no affirmative duty towards its insured, has violated fundamental principles of the United States Constitution by laying asunder the Rule of Law and the principle of *stare decisis*.

Courts have time and time again recognized that the doctrine of *stare decisis* is of "fundamental importance to the Rule of Law." *See, e.g., Hilton v. South Carolina Public Railways Commission*, 112 S.Ct. 560 (1991); *Welch v. Texas Dent. Highways and Public Transp.*, 483 U.S. 468 (1987); *see also, Patterson v. McLean Credit Union*, 491 U.S. 164 (1982); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932) (Brandeis, J., dissenting).

Adherence to the principle of *stare decisis* and precedent promotes "stability, predictability, and respect for judicial authority." *Hilton*, 112 S.Ct. at 564; *Vasquez v. Hillery*, 474 U.S. 254 (1986). For these reasons, Courts refuse to depart from the doctrine of *stare decisis* without some "compelling justification." *Hilton*, 112 S.Ct. at 564; *Arizona v. Rumsey*, 467 U.S. 203 (1984). Courts are particularly adherent to the principle of *stare decisis* where legislative power is implicated. In *Hilton v. South Carolina Public Railways Commission* the U.S. Supreme Court declared:

> "*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this

> instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response."

*Id.* at 564.

Recently, the U.S. Supreme Court, in refusing to revisit holdings reached in *Roe v. Wade,* 410 U.S. 113 (1973) which were contrary to the personal views of some of the Justices, rearticulated the importance of adherence to the principle of *stare decisis* despite strongly held personal beliefs. In *Planned Parenthood v. Casey,* 112 S.Ct. 2791 (1992) the Court stated:

> "The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, The Nature of the Judicial Process 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. See Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16."

*Id.* at 2808.

The importance of adherence to the principle of *stare decisis* has been time and time again addressed by the U.S. Supreme Court and followed, despite changes of Justices and the passage of time. In *Vasquez v. Hillery,* 474 U.S. 254 (1986) the U.S. Supreme Court explained the important function of *stare decisis* in ensuring "that the law will not merely change erratically, but will develop in a principled and intelligent fashion." *Id.* at 265. The Court further explained:

> "That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.

*Id.* at 265-66, *citing Burnet, supra,* 285 U.S. at 412.

In *Patterson, supra,* the U.S. Supreme Court further explained:

> "The Court has said often and with great emphasis that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.' Welch v. Texas Dept. Of Highways and Public Transportation, 483 U.S. 468, 494 (1987). Although we have cautioned that '*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision,' Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235, 241 (1970), it is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.' The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton). See also, Vasguez v. Hillery, 474 U.S. 254, 265 (1986) (*stare decisis* ensures that 'the law will not merely change erratically' and 'permits society to presume that the bedrock principles are founded in the law rather than in the proclivities of individuals')."

*Id.* at 172.

The Supreme Court of Pennsylvania has engaged in the type of whimsical decision-making that has been abhorred by Your Court. Less than four years ago, a Majority of the Pennsylvania Supreme Court, consisting of Justices McDermott, Papadakos, Larsen and Stout rearticulated years of precedent

when it held in *Dercoli v. Pennsylvania Nat. Mut. Ins. Co.*, 520 Pa. 471, 554 A.2d 906 (1989) that a first party carrier, the insured's own carrier, is liable when it fails to "deal with the [insured] on a fair and frank basis, and at all times, to act in good faith." *Id.* at 478, 554 A.2d at 909. According to the Majority in *Dercoli*, the insurer failed in its "duty of full and complete disclosure as to all of the benefits and every coverage that is provided by the applicable policy or policies along with all requirements, including any time limitations for making a claim." *Id.* at 478, 554 A.2d at 909. *Also see,* Justice Papadakos' Concurring Opinion, *Id.* at 481, 554 A.2d at 911 in which Justice McDermott joined.

Justice Flaherty dissented in the *Dercoli* Decision:

> "I dissent. *Until today* an insurance company on the facts pleaded in this case has had no *fiduciary* duty to an insured, *even when it advised its insured that he does not need a lawyer.* But if, under the *guise of 'fair dealing and good faith,'* we are *now* to decide that insurance companies have *a fiduciary duty* to advise of *every possible claim,* surely insurance companies will cease even to talk to claimants for fear of breaching this new judicially declared duty.
>
> • • •
>
> As much as we all would like to see unfortunate victims of automobile accidents compensated fully, *such compensation cannot be achieved at the cost of dismantling the insurance industry. It has always been the case that insurance companies, insureds and claimants are potential adversaries."*

*Id.* at 483, 554 A.2d at 911-912. (Emphasis supplied.) (Zappala, J., joins in this Dissenting Opinion; Nix, C.J. separately dissented.)

Less than four years later in the instant case, with Justice Larsen and Justice McDermott not participating, *the Dercoli dissent of three has become a Majority of three.* The legal principle of *"stare decisis,"* the adherence to precedent, requires that the Rule of Law should not change so quickly merely because half of the Majority in *Dercoli* did not and/or could not participate in the instant case. Because of the importance of this issue for all insurance consumers in Pennsylvania and as guidance to all state Supreme Courts nationwide, the Petition for Certiorari should be granted.

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**B. Despite Justice Flaherty's Statement In His *Dercoli* Dissent, Insurance Companies Have Always Had A Fiduciary Duty To Their Insureds**

---

Long before the legislative mandates established in the No-Fault Act and accompanying Insurance Department Regulations, Pennsylvania Supreme Courts had consistently recognized an insurer's important duty of fair dealing toward an insured. The Pennsylvania Supreme Court, more than half a century ago, declared in *Fedas v. Ins. Co. of the State of Penna.*, 300 Pa. 555, 151 A. 285 (1930):

> "The utmost fair dealing should characterize the transactions between an insurance company and the insured. If the insurer, having knowledge of a loss, by any act throws the insured off his guard as to the necessity of performing some duty enjoined by the policy, the insurer should not be permitted to take advantage of the failure to act."

*Id.* at 559.

The duty of "utmost fair dealing" was repeatedly expressed by the Pennsylvania Supreme Court in cases which followed *Fedas*. *See, Cowden v. Aetna Casualty and Surety Co.*, 389 Pa. 459, 470, 134 A.2d 223 (1957) ("... the insurer must accord the interest of its insured the same faithful consideration it gives its own interest ..."); *Gedeon v. State Farm Mut. Auto. Ins. Co.*, 410 Pa. 55, 59, 188 A.2d 320 (1963) ("... the insurer assumes a fiduciary position towards the insured and becomes obligated to act in good faith and with due care in representing the interests of the insured."); *Gray v. Nationwide Mut. Ins. Co.*, 422 Pa. 500, 504, 223 A.2d 8 (1966) ("... the insurer assumes a fiduciary position towards the insured and becomes obligated to act in good faith and with due care in representing the interests of the insured."); in *Dercoli, supra* at 477, 554 A.2d at 909 it has long been recognized that " 'the utmost fair dealing should characterize the transactions between an insurance company and the insured.' "

The Decision of the three-Justice Majority in the instant action vitiates the long years of precedent set forth above by requiring that the insurer make "knowing and purposeful misrepresentation" and undertake to act "as the insured's counsel" before any breach of duty occurs. *See*, Opinion, p. 4 (attached as an Exhibit) (App. 9a).

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**C. The Legislature, By Passing The Pennsylvania No-Fault Act, Mandated That Insurance Carriers Assume A Fiduciary Responsibility To Their Insureds And Pay Them All Benefits To Which They Are Entitled**

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A basic tenet of statutory construction is that Judges and Justices must put aside their own philosophies and follow the

public policy of the community as expressed in the constitution, legislation, and established precedent. Judges and Justices may have the power when they cease to be a Minority and become a Majority, but they do not have the right to ignore legislative intent and public policy expressed in properly-passed statutes. The Statutory Construction Act, 1 Pa. C.S.A. §1901, *et seq.*, demands that Courts seek out and follow the legislative intent in all statutory construction.

The particular statute involved in this case is the now-repealed No-Fault Motor Vehicle Insurance Act, 40 P.S. §1009.101 *et seq.* The expressed Findings and Purposes included:

> (a) Findings—
>
> • • •
>
> (3) the maximum feasible restoration of all individuals injured and compensation of the economic losses of the survivors of all individuals killed ... .
>
> • • •
>
> (5) exhaustive studies ... have determined that the present basic system of motor vehicle accident and insurance law ... is not such a low-cost, comprehensive, and fair system;
>
> (6) careful studies ... have demonstrated that a basic system ... which:
>
> (A) assures every victim payment of all his basic medical and rehabilitation costs, and recovery of a reasonable amount of work loss ... is such a low-cost ... system;
>
> • • •
>
> (b) Purposes—
>
> Therefore, it is hereby declared to be the policy of the General Assembly to establish ... a Statewide system of prompt and adequate basic loss benefits for motor

vehicle accident victims and the survivors of deceased victims.

40 P.S. §1009.102.

The innovative insurance scheme contemplated by the legislature and enacted in 1974 *envisioned a system whereby an insured and his insurer were partners, not adversaries.*

Following the passage of the No-Fault Act, the Pennsylvania Insurance Department, by regulation, mandated that all insurance companies send their insureds the following notice:

C. LAWSUITS.

You will not need a lawyer to collect your No-Fault benefits. If you are injured, [contact your insurance company or your insurance agent] to get claims forms. You should be paid within 30 days after the company receives completed forms from all related parties (you, your employer, the hospital, etc.).

31 Pa. Code §66.4, Transition Procedures.

After an accident when the insured went to his insurer in person or by phone, he was given an application to complete that stated at the top:

TO ENABLE *US TO DETERMINE IF YOU ARE ENTITLED TO BENEFITS* UNDER THE PERSONAL INJURY PROTECTION LAW, *PLEASE COMPLETE THIS FORM AND RETURN IT PROMPTLY.*

No-Fault Application (emphasis supplied).

The application that the insured completed unequivocally stated that it was the responsibility of the insurance carrier—"*us* ... to determine if *you* are entitled to benefits under the Personal Injury Protection Law." (Emphasis in original.)

Although Justice Flaherty in his *Dercoli* dissent references the mandated notice that insureds *will not need to consult lawyers,* he goes on to assert that insureds should realize that they needed lawyers because insurance companies are their enemies. This may be Justice Flaherty's philosophy, but it certainly was not the legislative intent.

The No-Fault Act was designed to revolutionize the prior adversarial relationships between insurer and insured. No longer were claimant and company to be enemies. Instead, they were to be partners, with claimant providing basic information and insurer deciding the benefits due and paying them. Nor did the insured have to make a claim for each individual category of benefits he sought. The application asked for basic information, but it did not include any space where the insured had to denominate the benefits for which he was making a claim. That responsibility was on the insurer. In fact, 40 P.S. §1009.106(a)(5) affirmatively required that insurance carriers who were going to deny benefits to which the insureds might be entitled must "give to the claimant written notice of the rejection promptly, but in no event more than thirty days after the receipt of reasonable proof of the loss" 40 P.S. §1009.106 (a)(5).

Further, the No-Fault Act incorporated penalty provisions, including counsel fees, 40 P.S. §1009.107, and interest, 40 P.S. §1009.106(a)(2), to sanction insurance carriers that did not perform their statutorily mandated duties.

There is no question, therefore, that the *Dercoli* three-member Minority that is the present three-member Majority in this case *is clearly wrong in holding that an insurance carrier does not have an affirmative duty to pay benefits and inferentially advise its insured as to his or her right to such benefits.* Not only are they wrong, but they violated one of the

most basic constitutional principles in usurping authority to overturn the Majority during a period when two members of the previous Majority were absent—the principle of *stare decisis* which is of "fundamental importance to the Rule of Law." *Hilton v. South Carolina Public Railways Commission*, 112 S.Ct. 560 (1991).

---

## D. The *Dercoli* Minority/Present Majority Misapprehended The Facts And Law In Their Holding That Mrs. Miller, From 1980 Through 1984, Had Only A *Potential* Right To Obtain Work Loss Benefits

---

The federal studies, proposed federal act, other studies and various state experiments referenced in the No-Fault Act virtually all provided for "work loss" benefits to be paid to survivors of deceased victims. The Pennsylvania No-Fault Act defines "work loss" as "loss of gross income of victim"; "victim" includes all who sustain injuries including "deceased victim"; and "injury" includes death (*see*, Section 1009.103, "Definitions").

The Superior Court in 1979, with one dissent, and the Pennsylvania Supreme Court on September 22, 1980, unanimously held in two consolidated cases that *survivors and estates* of deceased victims were entitled to "work loss" benefits. *Heffner v. Allstate Ins. Co.*, *supra* and *Pontius v. U.S.F.&G.*, *supra*.

In the instant case, Mrs. Miller lost her son. Keystone paid survivor's loss benefits to her based on her dependency on her son. There is, therefore, no question that when Mrs. Miller applied for benefits and gave a statement to Keystone in October, 1980, she was *entitled, and the insurance company knew she was entitled, to "work loss" benefits.*

Present counsel, anticipating that insurance carriers would not perform their legislatively mandated duty to inform and pay benefits, commenced in 1979 a class action entitled *Nye v. Erie Ins. Exchange, supra,* which included 31 of the larger insurance companies in Pennsylvania *including Keystone Ins. Co.,* the Defendant in the instant case. Although successful before the Superior Court, the Pennsylvania Supreme Court held that *Nye* did not have standing to sue any carrier other than his own.

As counsel anticipated, the Defendant in this case followed a *policy of keeping secret* from its insureds *their right to $15,000 of work loss benefits* and, obviously, not voluntarily paying same. *See,* Confidential Memo referenced on page 3 of Majority Opinion (Exhibit A) which states:

> "In addition, we made no mention to Mrs. Miller as discussed pertaining to possible benefits for lost wages and will merely await developments in that regard."

(App. 5a.)

Although Keystone and the Majority in this case reference *Freeze v. Donegal Mut. Ins. Co.,* 504 Pa. 218, 470 A.2d 958 (1983) for the proposition that the law was uncertain until *Freeze,* it is clear that the law *was unequivocal as to survivors and estates of deceased victims where there was dependency in 1980,* and *Freeze* merely confirmed that the law *also* applied to 11-year-old children who were not in the work force. *Id.* at 220, 470 A.2d at 959.

What Keystone did in the instant case amounts to fraud. Although Keystone entered into a contract with Mr. Miller to pay the benefits due, and although Mrs. Miller signed a claim form which had a heading that Keystone would determine and pay the benefits to which she was entitled, Keystone kept Mrs. Miller's money as it might have kept her money from an

overpayment of premium or by failing to pay medical bills or funeral expenses. Do not insurance companies, like tellers at banks, clerks at department stores, and/or sellers of goods, have a legal duty to provide benefits, goods or services for money paid? Does the Supreme Court intend to sanction the retention of money, goods, services or benefits so long as the insured, customer or client does not realize that he is entitled to same? Would such a requirement of good faith or honesty result "at the cost of dismantling the insurance industry"? (Justice Flaherty's dissent in *Dercoli, supra* at 483, 554 A.2d at 912.) Are not insurance companies in business to pay benefits?

The Majority on numerous occasions draws significance from its own conclusion that the insured only had "potential claims"[1] for post-mortem work loss benefits when, in reality, there is no doubt that *in 1980, and for the next four years until the statute of limitations expired,* Mrs. Miller had a *real* claim.

Repeating the word "potential," as the Majority does, cannot change the fact that Mrs. Miller was entitled to work loss benefits *and only the statute of limitations precludes her from recovering same.* The statute of limitations was intended to protect defendants who are not aware that they did something wrong or might be called upon to defend themselves for something that happened years before of which they had no notice. The statute of limitations was not intended to protect a carrier that knew it had a responsibility to provide benefits for premiums received and who, instead, perpetrated a fraud upon its insured.

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[1] *See,* Slip Op. p. 3 ("potential entitlement" and "possible wage loss benefits"); p. 3, n.2 ("possible benefits" for lost wages); p. 5 ("potential claims," "potentially entitled," and "knowledge of the possibility"); p. 6 ("potential claims"); p. 10 ("any or all available benefits"); p. 11 ("potentially entitled").

## E. The Three-Justice Majority In The Instant Case Misapprehended The Legal Distinction Between The Duty Owed By A Third Party Carrier Or One's Employer And The Duty That An Insurer Owes To Its Own Insured

There has always been a distinction between the duty that an insurance carrier owes to its own insured and the absence of any duty to third parties. Prior to the passage of the No-Fault Law, when an individual was injured or killed in a motor vehicle accident, it was generally the tortfeasor or third party carrier that had the responsibility to pay medical bills, property damage, funeral bills, and lost wages. There was no question that such a carrier was an adversary, and there was a need to hire one's own attorney to represent oneself.

The No-Fault Act, however, changed the situation so that an insured went to and recovered substantial benefits from his own insurance carrier, was told that he did not need a lawyer in dealing with his own carrier, and that his own insurance company would provide any and all benefits to which the insured was entitled.

The three-Justice Majority, by relying upon *Taglianetti by Taglianetti v. W.C.A.B. (Hospital of the Univ. of Penna.)*, 503 Pa. 270, 469 A.2d 548 (1983) misapprehends that the relationship between an insured and insurer is vastly different than that between employee and employer.

In *Taglianetti*, an unidentified female in the personnel office of the University of Pennsylvania Hospital misinformed the surviving widow of a deceased employee that, apart from life insurance and the death gratuity, she had no other widow's benefits. *Id.* at 273, 469 A.2d at 550. The information turned out to be incorrect because the surviving widow was entitled to Workmen's Compensation death benefits under 77 P.S. §602. *Id.* at 272, 469 A.2d at 549. The Court in *Taglianetti*,

citing exclusively Workmen's Compensation cases and statutes, concluded that because there was no evidence that the unidentified female in the personnel office "intentionally deceived" the surviving widow and because the surviving widow's attorney conceded that an employer has no affirmative duty to provide information of possible benefits, it would not "impose a duty upon an *employer* where none exists." *Id.* at 274, 469 A.2d at 550. (Emphasis added.)

The present case is not a Workmen's Compensation case, an employment case, nor any other third party insurance or relationship type case. It is a no fault/first party case and, under such cases, an insurance carrier has a fiduciary duty to its insured.

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**F. The Holding In This Case Is Not Only Contrary To The Court's Prior Holdings As To First Party Insurance Law, But Also Will Have Far-Reaching Application In Many Other Insurance Cases With Catastrophic Results**

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Although the legislature repealed the No-Fault Law, it adopted in 1984 and amended in 1990, the Motor Vehicle Financial Responsibility Law (MVFRL), 75 P.S. §1701, *et seq.* The MVFRL continues to require a close relationship between an insured and insurer in obtaining first party benefits which include medical expenses, wage losses, funeral expense, death benefits, and uninsured and underinsured motorist coverage. The legislature requires that insurance carriers provide their insureds with Section 1791 "important notices" to advise their insureds as to their potential rights to purchase coverage. Insurance carriers must explain coverages and obtain signatures and dates to specific forms to select limited tort, reject uninsured/underinsured coverage or stacking of same. *See, e.g.,* Sections 1731 and 1738. *Also see,* Section 1734

requiring a written waiver, particularly under the 1984 law. Surely, the three-Justice Decision in this case flies in the face of such legislation.

The Superior Court of Pennsylvania recently decided *Banker v. Valley Forge Ins. Co.*, 401 Pa. Superior Ct. 367, 585 A.2d 504 (1991), *alloc. denied,* 529 Pa. 615, 600 A.2d 532 (1991), that emphasizes the duty of an insurance company to deal with an insured fairly and in good faith, which " *'includes the duty of full and complete disclosure as to all of the benefits and every coverage that is provided by the applicable policy or policies.'* " *Id.* at 379, 585 A.2d at 510. (Emphasis added.)

The Decision of the three-member Majority in this case gives a clear signal to insurers that they should merely accept claims information, pay some *nominal* amount, and sit back and wait for the statute of limitations to run. Unsophisticated consumers will, like Mrs. Miller, assume they have received all to which they are entitled. Others will hire attorneys to litigate their claims, clogging our already over-crowded court system. The effects will be felt in all areas of insurance—life, health, homeowners, fire and theft, and automobile. What the Majority does in *this case* is give a license to insurers to ignore insurance statutes and contractual obligations in favor of higher profits for insurance companies and illusory coverage for everyone. Granting a Petition for Certiorari is essential to correct this outrageous Decision that may affect every man, woman and child in Pennsylvania.

## CONCLUSION

In *1980,* Keystone received premiums from the Millers and, in return, promised to pay the no-fault benefits to which they were entitled. The Pennsylvania Supreme Court unanimously decided *Heffner* and *Pontius,* holding that dependent

survivors were entitled to receive post-mortem work loss benefits. Mr. Miller died and Mrs. Miller was determined to be a dependent survivor. She filed a claim form that said Keystone would pay the no-fault benefits to which she was entitled. Knowing from *Heffner, Pontius* and *Nye* that Mrs. Miller was entitled to post-mortem work loss benefits, Keystone chose as its corporate policy *not* to pay same unless specifically requested and *not* to tell insureds of their entitlement. Keystone closed its file, waited four years and claimed the statute of limitations as a defense. That is out and out fraud in addition to the breach of its statutorily mandated duty. The Pennsylvania Supreme Court, by ignoring years of precedent, the Rule of Law and the doctrine of *stare decisis* sanctioned Keystone's conduct during a period when two Justices who had helped to clarify the good faith obligations an insurer has towards its insureds were absent from the bench. Accordingly, the Petition for Certiorari should be granted.

Respectfully submitted,
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Dated: July 27, 1994

**[J-172-1992]**

**IN THE SUPREME COURT OF PENNSYLVANIA**

**MIDDLE DISTRICT**

No. 84 Middle District Appeal Docket 1991

Appellees' Application for Reargument

MARY C. MILLER, Administratrix of the Estate of JOHN R. MILLER, Deceased, and all others similarly situated,

Appellees,

v.

KEYSTONE INSURANCE COMPANY,

Appellant

**ORDER**

**PER CURIAM**

AND NOW, this 29th day of April, 1994, the Application for Reargument is denied.

Mr. Justice Larsen and Mr. Justice McDermott did not participate in this Application for Reargument.

Mr. Justice Papadakos dissents.

Mr. Justice Cappy dissents.

TRUE AND CORRECT COPY:
Attest: May 2, 1994
/s/Shirley Bailey
CHIEF CLERK
MIDDLE DISTRICT

**Mary C. MILLER, Administratrix of the Estate of John R. Miller, Deceased, and all others similarly situated, Appellees,**

**v.**

**KEYSTONE INSURANCE COMPANY, Appellant.**

Supreme Court of Pennsylvania.

Argued May 5, 1992.

Decided Jan. 31, 1994.

Estate of insured sought postmortem work loss benefits under No-Fault Motor Vehicle Insurance Act of 1974. The Court of Common Pleas, Dauphin County, No. 26 S 1987, Warren G. Morgan, J., entered summary judgment for no-fault automobile insurer on statute of limitations grounds. Estate appealed. The Superior Court, No. 304 Harrisburg 1989, 402 Pa.Super. 213, 586 A.2d 936, reversed. Allowance of appeal was granted. The Supreme Court, No. 84 M.D. Appeal Docket 1991, Zappala, J., held that insurer had no duty of good faith and fair dealing to inform estate of potential availability of postmortem work loss benefits, and thus statute of limitations was not tolled on that basis.

Reversed; order granting summary judgment reinstated.

Cappy, J., filed dissenting opinion, in which Papadakos, J., joined.

**1. Limitation of Actions 46(1)**

No-fault automobile insurer had no duty of good faith and fair dealing to inform insured's estate of potential availability of postmortem work loss benefits, and thus statute of limitations was not tolled on that basis, absent allegation or evidence that insurer voluntarily assumed to act as counsel to estate, that

insurer induced estate to refrain from retaining counsel, that insurer made any promises to estate, or that insurer acted to defraud or to lull estate into false sense of security. 40 P.S. §§1009.101-1009.701 (Repealed).

**2. Courts 102(1)**

Supreme Court opinion in support of overturning case was without precedential authority where opinion commanded allegiance of only two members of Court.

**3. Workers' Compensation 1073**

Absent evidence of fraud, intentional deception, or making of misleading statements, employer has no affirmative duty to apprise workers' compensation claimant of any or all available benefits.

**4. Limitation of Actions 13**

If insurer fraudulently or deceptively lulls insured into inaction, principle of estoppel will operate to prevent insurer from claiming defense of untimeliness when insured's failure to timely file petition has resulted from insurer's own actions.

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A. Richard Feldman, Philadelphia, for appellant.

Richard C. Angino, Pamela G. Shuman, Harrisburg, for appellees.

Before NIX, C.J., and FLAHERTY, McDERMOTT, ZAPPALA, PAPADAKOS and CAPPY, JJ.

**OPINION**

ZAPPALA, Justice.

This case involves a claim for post-mortem work loss benefits under the now-repealed No-Fault Motor Vehicle Insurance Act, Act of July 19, 1974 P.L. 489, No. 176 §§ 101-701, 40 P.S. §§ 1009.101-1009.701. On August 12, 1980,

John Miller, the named insured on a no-fault automobile insurance policy issued by the Appellant, Keystone Insurance Company (Keystone), sustained fatal injuries in a motor vehicle accident. Appellant promptly paid funeral, collision and survivor's loss benefits to Appellee Mary Miller, the mother of John Miller. On August 11, 1986, Appellee filed a claim on behalf of her son's estate, seeking post-mortem work loss benefits, plus interest and counsel fees, for herself and the class which she represents. Following a change in venue and an involved procedural history, the Court of Common Pleas of Dauphin County conducted a hearing and granted Appellant's motion for summary judgment on the basis that the Appellee's claim was barred by the statute of limitations.[1] On appeal, Superior Court interpreted our decision in *Dercoli v. Pennsylvania National Mutual Insurance Company,* 520 Pa. 471, 554 A.2d 906 (1989), applied it retroactively and reversed the trial court's grant of summary judgment. We granted allowance of appeal to consider Superior Court's interpretation of *Dercoli* as well as its retroactive application.

Initially, we note that we need not decide the issue of whether *Dercoli, supra,* requires retroactive application because of our determination that it is not applicable to the instant case. The essence of Appellant's argument is that Superior Court misinterpreted this Court's holding in *Dercoli* and applied it to a situation which is factually distinguishable. We agree. There being no error of law or abuse of discretion, we find the trial court properly entered summary judgment in favor of Appellant.

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1. In orders entered on May 16, 1989, the court granted Appellant's motion for summary judgment as to Appellee's individual claim; denied on various grounds, all of the petitions to intervene; and denied the motion for class certification as no representative plaintiff remained to lead the class.

The pertinent factual background is as follows: Appellant paid Appellee $1,500 in funeral benefits on September 15, 1980, $5,652.97 in collision coverage benefits on October 1, 1980, and $5,000 in survivor's loss benefits over a period of time ending on April 30, 1982. Appellee did not request nor did she seek post-mortem work loss benefits until August, 1986, when she filed a complaint averring that Keystone misled her into believing that her son's estate had no valid claim for work loss benefits. Appellee did not attend the trial court's hearing and the sole evidence introduced into the record on her behalf consisted of two exhibits offered by her counsel. One exhibit, to which Appellant objected, was a copy of a letter written by an independent adjuster, retained by Appellant, to Appellant's claims manager. This letter dated October 21, 1980, indicated that the adjuster knew of the estate's potential entitlement to work loss benefits by reason of recent court decisions but that the adjuster made no mention of "possible" wage loss benefits to Miller and would "await developments in that regard".[2] The other exhibit was a Keystone chart showing the various payments made to plaintiff,

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[2] Pursuant to the trial court's orders to produce documents without regard to the existence of the work product doctrine and privilege, Keystone stamped "confidential" and produced the following document from the Arthur Reeher Company, which was addressed to Mr. Sal Liberto, Keystone Claims Manager:

> This will supplement our previous report dated 10-10-80 and acknowledge our Harrisburg Branch cc of 10-16-80, and our phone conversation of 10-20-80 along with serving as our closing report.
>
> As you have indicated in our telephone conversation of 10-20-80 that Mary Miller (mother of the deceased insured) would be entitled to survivors' benefits which according to your Philadelphia office would involve a monthly check of $135.00 until the $5,000 survivors' benefit is exhausted [sic] we have notified Mrs. Miller, that she will be receiving monthly payments shortly in that regard. In addition, we made no mention to Mrs. Miller as discussed pertaining to possible benefits for lost wages and will merely await developments in that regard.

including a final payment of survivor's loss benefits on April 30, 1982.

Appellee argued to the trial court that collision benefits are not considered no-fault benefits, hence, a four year statute of limitations was applicable.[3] The trial court determined that even if the four year statute of limitations was triggered, Appellee's action was untimely as the four year period expired on August 12, 1984.[4] Appellee did not dispute the trial court's interpretation of the applicable statute of limitations in her appeal to Superior Court. Instead, she asserted that Keystone knew of the estate's entitlement to work loss benefits by reason of recent appellate decisions but consciously and deliberately elected to keep silent in its dealings with her. The Appellee contended that these actions constituted a breach of the duty of good faith and fair dealing announced in *Dercoli* which operated to toll the statute of limitations.

In the Superior Court's view, *Dercoli* held that an insurance company has an affirmative duty to inform an insured of all the potential claims that the insured may have against the company when the three following conditions exist: (1) the

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In light of the above, our activity, in the York area would now appear to be complete while our Harrisburg Branch follows further in their investigation and handling. Thereofre, [sic] we are taking liberty of retirring [sic] our file and submitting our service invoice for your consideration.

We again thank you. ... (R. 170a).

3. Appellee also argued that Keystone's failure to provide her with a notice of rejection tolled the statute of limitations and that the limitations period was tolled because Keystone allegedly misrepresented the law to Appellee. Apparently the Appellee did not argue that Keystone had an affirmative duty of good faith and fair dealing that obligated Keystone to explain all potential benefits as *Dercoli* was not decided until March 3, 1989.

4. The court ignored Keystone's later payments of survivor's benefits ending on April 30, 1982, for these purposes since those payments were not for loss arising otherwise than from death.

insurer has assumed the responsibility for processing its insured's claims; (2) the insurer knows that the insured is relying exclusively on its advice and counsel; and, (3) the insurer has knowledge regarding an additional claim for benefits to which the claimant is potentially entitled. Superior Court found that the responsibility to obtain for the estate all that it is potentially entitled to is implicitly imposed by the No-Fault Act. It also determined that when an insurer counsels an unrepresented claimant, the insurer tacitly knows that its level of information is greater than that of the insured. Finally, Superior Court held that even though the law is not settled on the question of whether an insured is able to recover at the time the insured's claims are being processed, the duty of good faith and fair dealing announced in *Dercoli* imposes an affirmative obligation upon an insurer to inform its insured that it has knowledge of the possibility of a claim for recovery and that it is no longer acting in the interests of its unrepresented insureds in this matter. Finding some evidence for the imposition of the *Dercoli* duty of good faith and fair dealing, Superior Court reversed and remanded to determine whether Miller was relying upon the advice of Appellant's agent or was represented by her own counsel.[5]

Superior Court was incorrect in holding that *Dercoli* imposes an affirmative duty upon an insurer to advise and inform an insured of all potential claims when the insurer assumes the responsibility for processing the claim. Superior Court erroneously interpreted and impermissibly expanded our limited holding in *Dercoli* beyond its natural bounds by applying it to a situation which is factually distinguishable.

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5. Superior Court also quashed the appeals of the remaining petitions to intervene and those parties have not sought leave to appeal.

*Dercoli* involved a situation where the widow of an insured sued two automobile insurers for damages for breach of an alleged duty of good faith and fair dealing. The plaintiff alleged that she had been severely injured in an automobile accident in which her late husband had been at fault. Significantly, she further alleged that upon the advice and assurances of the insurers that she would receive everything to which she was entitled, she was induced to refrain from hiring counsel to represent her in her dealings with the insurers. While the insurers were still adjusting the plaintiff's claims, the defense of interspousal immunity was abolished. This meant that the plaintiff had a viable tort claim for negligence against her late husband's estate which was unquestionably covered by the policies' liability coverage. Notwithstanding the insurers's representations and assurances, the insurers did not advise the plaintiff of the potential tort claim or of the fact that the claim was clearly covered by the policies. The insurers in *Dercoli* successfully demurred to the complaint and the plaintiff appealed. Superior Court affirmed the trial court's dismissal. This Court reversed.

Taking great care to emphasize that the insurers in *Dercoli* actively fostered the insured's erroneous belief that no viable tort claim existed, this Court stated:

> The appellees' agents in this case voluntarily undertook to provide assistance and advice to appellant and in the process advised her against retaining independent legal counsel. The appellees were bound to deal with the appellant on a fair and frank basis, and at all times, to act in good faith. The duty of an insurance company to deal with the insured fairly and in good faith includes the duty of full and complete disclosure as to all of the benefits and every coverage that is provided by the applicable

> policy or policies along with all requirements, including any time limitations for making a claim. (Citations omitted.) This is especially true where the insurer undertakes to advise and counsel the insured's claim for benefits.

520 Pa. at 477-478, 554 A.2d at 909. Clearly, the insurer's knowing and purposeful misrepresentation was critical to this Court's determination that the insurers were bound to disclose all of the benefits to which the claimant was entitled.

Appellant argues that Superior Court expanded the scope of the duty of good faith and fair dealing announced in *Dercoli* by broadly applying it to a factual situation where the insurer did not act in any manner to discourage the insured from obtaining legal counsel.

[1] In this case, the record is totally devoid of any indication that the insurer voluntarily assumed to act as the insured's counsel. In fact, there is no allegation nor any evidence in the record to suggest that Appellant induced Appellee to refrain from retaining counsel, that Appellant made any promises to Appellee, or that Appellant in any way voluntarily transformed itself into a legal advisor.

We find this case factually similar to *Taglianetti v. Workmen's Compensation Appeal Board*, 503 Pa. 270, 469 A.2d 548 (1983). *Taglianetti* involved a case where a widow filed a claim for survivor's benefits under the Workmen's Compensation Act six years after her husband's death. The claimant received a check representing three months of death "gratuity" benefits shortly after her husband's death in April, 1973. Two months later, the claimant requested information from her late husband's employer as to any widow's benefits due her. Unidentified employees informed her that there were no other benefits apart from life insurance and the death gratuity that she received. The Plaintiff did not seek advice from any other

source and claimed that she did not learn of her potential entitlement to work-related benefits until 1978, when she read a newspaper account of a case regarding this Court's decision in two other "heart attack" cases. On April 3, 1979, the Plaintiff filed a claim alleging that the statute of limitations was tolled because her late husband's employer failed to notify her of her right to file a claim for death benefits. This Court refused to impose an affirmative duty upon an employer to apprise an employee or claimant of all available benefits. We held that in the absence of evidence of fraud, intentional deception, or the making of misleading statements, the employer had no affirmative duty to apprise a compensation claimant of any or all available benefits.

Although the opinion announcing the judgment of the court in *Dercoli* expressed the view that this Court's prior decision in *Taglianetti* should be overruled,[6] Justice Papadakos, joined by Justice McDermott wrote separately to make clear that he did not agree with the proposed overruling of *Taglianetti*. In reaffirming the principle of *Taglianetti*, Mr. Justice Papadakos wrote:

> In *Taglianetti, supra,* we agreed with the contention that an employer was under no legally imposed affirmative duty to provide information of possible worker's compensation benefits to a deceased employee's spouse where there was no evidence of fraud, intentional deception, or the making of misleading statements ... . [In *Dercoli,]* Once the insurers knowingly and purposefully

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6. "We believe that *Taglianetti* was wrongly decided in that the decision in that case tends to relieve insurers and similar entities of the obligation to deal fairly, honestly, openly and in good faith with lay-claimants and non-experts who may be entitled to benefits and who are the very people the insurers have obligated themselves to protect." 520 Pa. at 479, 554 A.2d at 910. (Opinion of Larsen, J.).

> talked the widow out of seeking independent legal counsel, the insurers themselves voluntarily placed themselves in the position of protecting the widow and obtaining for her all benefits that were reasonably due under the facts and state of law known to the insurers ... . Our majority opinion does not transform insurance companies into legal service advisors for claimants, as feared by the dissent. On the contrary, in this case, the insurers themselves voluntarily transformed themselves into legal advisors to the widow .. .. *Dercoli,* 520 Pa. at 481-482, 554 A.2d 906.

[2] Because the *Dercoli* opinion in support of overturning *Taglianetti* commanded the allegiance of only two members of this Court, this view is without precedential authority.[7] *Commonwealth v. Covil,* 474 Pa. 375, 378 A.2d 841, 844 (1977); *Mt. Lebanon v. County Board of Elections,* 470 Pa. 317, 368 A.2d 648 (1977). Notwithstanding this confusion expressed in *Dercoli, Dercoli* is not inconsistent with *Taglianetti.* Rather, we find that *Dercoli* was not the creation of a new duty, but simply an application of the principles enunciated in *Taglianetti.*

[3] We reaffirm our earlier rulings that in the absence of evidence of fraud, intentional deception, or the making of misleading statements, the employer has no affirmative duty to apprise a compensation claimant of any or all available benefits. This holding is in accord with our previous decisions in *D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Company,* 494 Pa. 501, 431 A.2d 966 (1981), and *Smith v. Harleysville Insurance Company,* 494 Pa. 515, 431 A.2d 974 (1981), where this Court declined the opportunity to

[7] Only former Mme. Justice Stout joined in the opinion announcing the judgment of the court.

create a judicial remedy for bad faith conduct which occurs under the No-Fault Act.

[4] It is undisputed that because the Appellee's action for work loss benefits was not commenced until almost six years after her son's death it is barred by the No-Fault Act's statute of limitations.[8] The fundamental and long-standing rule in Pennsylvania has been that a lack of knowledge, mistake or misunderstanding does not operate to toll the statute of limitations. *Sachritz v. Pennsylvania National Mutual Casualty Insurance Company*, 293 Pa.Super. 483, 439 A.2d 678 (1981), *aff'd*, 500 Pa. 167, 455 A.2d 101 (1982).[9] If, however, the insurer fraudulently or deceptively lulls the insured into inaction, the principle of estoppel will operate to prevent the insurer from claiming the defense of untimeliness when the insured's failure to timely file a petition has resulted from the insurer's own actions.

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8. The no-Fault Act provides the following limitations period for actions to recover benefits:

> (1) If no-fault benefits have not been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two years after the victim suffers the loss and either knows, or in the exercise of reasonable diligence should have known, that the loss was caused by the accident, or not later than four years after the accident, whichever is earlier. If no-fault benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant; may be commenced not later than two years after the last payment of benefits.

40 P.S. § 1009.106(c)(1).

9. In *Sachritz*, the plaintiff was a survivor who received some no-fault benefits from her deceased husband's insurer, but apparently had not been advised as to the possibility of a claim for post-mortem work loss benefits and failed to file a timely claim for them. This Court affirmed the Superior Court's finding that the insured's lack of knowledge of the estate's potential claim for post-mortem work loss benefits does not toll the statute of limitations on her claim.

In the present case, the record is devoid of any evidence that Keystone acted to defraud the Appellee. There is absolutely no evidence from which it could be reasonably interpreted that Keystone's words or conduct lulled the Appellee into a false sense of security. We are not confronted here with an insurer's actions which fostered an insured's erroneous belief that a claim has been or will be processed. To the contrary, the record unequivocally indicates that there was no discussion related to post-mortem survivor's benefits or the filing of a claim. Moreover, any claim that Appellant deceptively lulled the Appellee into inaction is fruitless as the Appellee's estate was only potentially entitled to benefits at the time she filed her original claim for benefits.[10]

The Order of Superior Court vacating the Order of the trial court is reversed and the Order of the Court of Common Pleas for Dauphin County granting Appellant's motion for Summary Judgment on June 2, 1989, is reinstated.

LARSEN, J., did not participate in the consideration or decision of this case.

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10. On September 22, 1980, at approximately the same time the Miller estate's claims were being processed, this Court decided the companion cases of *Allstate Insurance Company v. Heffner*, and *Pontius v. United States Fidelity and Guaranty Company*, 491 Pa. 447, 421 A.2d 629 (1980). *Heffner* concerned a claim for work loss benefits brought by the survivor of a deceased victim. *Pontius* concerned a claim for work loss benefits brought by the administrator of a deceased victim's estate. In each case, this Court affirmed the Superior Court's reversal of the trial court's grant of judgment on the pleadings in favor of the insurer. Although these decisions held that survivors of deceased victims are entitled to payment of work loss benefits, it was not until December 30, 1983, three months after the Appellee received her last benefits, and more than a year after the statute of limitations expired that this Court held that an estate is entitled to post-mortem work loss benefits. *Freeze v. Donegal Mutual Insurance Co.*, 504 Pa. 218, 470 A.2d 958 (1983).

McDERMOTT, J., did not participate in the decision of this case.

CAPPY, J., files a Dissenting Opinion in which PAPADAKOS, J., joins.

CAPPY, Justice, dissenting.

I am constrained to dissent.

On August 12, 1980, John R. Miller died in a motor vehicle accident. At that time he was the named insured on a Pennsylvania No-Fault Insurance Policy issued by Appellant, Keystone Insurance Company ("Keystone"). Keystone was immediately notified of its insured's fatality. Keystone, through its agent and without specific demand, voluntarily undertook to investigate and pay funeral, collision and survivor's loss benefits to Appellee, Mrs. Miller, the unrepresented mother of the named insured on the policy. However, at this time neither Keystone, nor its agent who allegedly assisted Mrs. Miller in presenting her claim to Keystone, informed Mrs. Miller concerning the potential for recovery of post-mortem work loss benefits under the No-Fault Act[1] or of the recent appellate activity concerning such recovery, which was unfavorable to Keystone.[2]

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1. No-fault Motor Vehicle Insurance Act, 40 P.S §§ 1009.101-1009.701, repealed.

2. In 1980, this Court held that survivors of deceased victims of motor vehicle accidents were entitled to post-mortem work loss benefits pursuant to the Pennsylvania No-fault Act, *Allstate Insurance Company v. Heffner*, 491 Pa. 447, 421 A.2d 629 (1980), and impliedly determined that such recovery also extended to the deceased victim's estate. *Pontius v. U.S.F. & G.*, 491 Pa. 447, 421 A.2d 629 (1980). As determined by the Superior Court, it cannot be denied that the insurance industry in this Commonwealth was aware of this appellate activity, and an internal memorandum prepared by Keystone to Mrs. Miller's claim representative regarding the information disclosed to her provides some evidence that Keystone was

Six years later, after learning of entitlement to post-mortem work loss benefits arising out of her son's fatal accident, Mrs. Miller filed a claim on behalf of her son's estate, seeking those benefits from Keystone, plus interest and counsel fees. The gravamen of her Complaint was that Keystone had breached its duty of good faith and fair dealing in knowingly misleading her into believing that she had no valid claim for work loss benefits, the representation upon which she had justifiably relied to her detriment. The trial court subsequently granted summary judgment in favor of Keystone on the basis that Mrs. Miller's Complaint was filed after expiration of the applicable statute of limitations.

On appeal, the Superior Court vacated the summary judgment entered below upon a determination that there existed some evidence for the imposition of the duty of good faith and fair dealing announced by this Court in *Dercoli v. Pennsylvania National Mutual Insurance Company*, 520 Pa. 471, 554 A.2d 906 (1989), which tolled the statute of limitations. It held that the *Dercoli* duty of good faith and fair dealing imposed an affirmative obligation upon an insurer to inform its insured that it has knowledge of the possibility of a claim for recovery and that it is no longer acting in the interests of its unrepresented insured in this matter where:

> (1) the insurer had assumed the responsibility for processing its insured's claims; (2) the insurer knew that

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aware of the unfavorable appellate activity in this area. *Miller v. Keystone Insurance Company*, 402 Pa.Super. 213, 229, 586 A.2d 936, 944 (1991). Moreover, it is clear that neither *Heffner* and *Pontius*, nor this Court's express determination that a deceased victim's estate is entitled to recover for work-loss in *Freeze v. Donegal Mutual Ins. Co.*, 504 Pa. 218, 470 A.2d 958 (1983), represented a "change" in the law of Pennsylvania. To the contrary, these cases merely decided what the No-fault Act had always required, and furthermore, served to dispel an incorrect interpretation of the Act being advanced by insurers.

> the insured was relying exclusively on its advice and counsel; and (3) the insurer had knowledge regarding an additional claim for benefits to which [the insured] was entitled and it failed to disclose such information.

*Miller,* 402 Pa.Super. at 223, 586 A.2d at 941. Despite the soundness of this holding, the Majority herein concludes that the Superior Court erroneously interpreted and impermissibly expanded the holding in *Dercoli* in this instance. I disagree.

The Majority concludes that *Dercoli* was carefully limited to situations where the insurer "actively fostered the insured's erroneous belief," and involved a situation where a "knowing and purposeful misrepresentation was critical" to the existence of a duty to disclose all available benefits. On this basis the Majority then determines that the Superior Court improperly expanded the scope of the *Dercoli* duty by broadly applying it to a *factually distinguishable situation.* It finds that here, in contrast to the situation in *Dercoli,* Keystone did not voluntarily assume or transform itself into a position of legal advisor, did not act in any manner to discourage Mrs. Miller from obtaining legal counsel, and did not make any promises to Mrs. Miller. The Majority then goes on to conclude that the matter *sub judice* is governed by *Taglianetti v. Workmen's Compensation Appeal Board,* 503 Pa. 270, 469 A.2d 548 (1983). This is error.

Unlike the Majority, I cannot conclude that the existence of the duty in *Dercoli* necessarily turned on, or should turn on, an affirmative undertaking of an insurance company to advise and counsel its insured in the insured's claim for benefits. It is my strong belief that the presence of such evidence in *Dercoli* only provided further support for the imposition of the long recognized duty owed by an insurance company to deal with the insured fairly, and in good faith, see *Fedas v. Insurance*

*Company of the State of Pennsylvania*, 300 Pa. 555, 151 A. 285 (1930), a duty that this Court reasonably determined to include, in a "non-adversarial setting," a "duty of full and complete disclosure as to all of the benefits and every coverage that is provided by the applicable policy or policies along with all requirements, including any time limitations for making a claim." *Dercoli*, 520 Pa. at 478, 554 A.2d at 909. My interpretation is further supported by this Court's statement in *Dercoli* that *"[t]his is especially true* where the insurer undertakes to advise and counsel the insured in the insured's claim for benefits." *Id.* (Emphasis added).

Furthermore, by interpreting *Dercoli* as applying only to the situation where an insured voluntarily assumes to act as "legal advisor" for its insured, the Majority fails to acknowledge that the assumption of such a "role" by the insurer would give rise to a duty much greater than that of good faith and fair dealing. It would support the existence of a fiduciary duty, the highest standard of duty implied by law—a duty arising from the relationship of legal advisor, which implies and necessitates great confidence, trust, candor and the highest degree of good faith to act, and *advocate*, for the benefit of the other as to matters within the scope of the relationship.

Such a limitation is also contrary to the responsibility implicitly imposed upon insurers and their agents by the No-Fault Act itself, which had a primary purpose of, *inter alia*, insuring that a claimant would not need an attorney to secure basic benefits. This purpose was effectuated through a non-adversarial scheme, which placed the burden on the insurer to investigate and pay claims, and encouraged claimants to place their trust and reliance in their insurance companies to see to it that claims were handled properly and that they received all benefits to which they were entitled.

Finally, and most importantly, I simply cannot condone the Majority's attempt to minimize and mischaracterize the alleged relationship of cooperation and trust apparently existing between Keystone, its agent and Mrs. Miller in this instance, by misplaced reliance upon *Taglianetti*. In *Taglianetti* it was an *employer's* insurance company, an unquestionably formidable *adversary*, who was relieved of an affirmative duty to apprise a deceased employee's wife of all available workmen's compensation benefits. I agree that in that instance, there is no *Dercoli* duty of good faith and fair dealing absent fraud, intentional deceit or misleading statements with regard to the claimant's interest. However, in the case *sub judice*, the insurance company is not an *adversary*, nor does it represent an *adversary*. In fact, the insurance company was the insurer of the claimant's deceased son and now represents the interest of the claimant, the personal representative of the son's estate. There simply is no adversarial relationship either real or imagined. *Taglianetti* does not apply to these facts.

Therefore, under the circumstances as alleged and argued by Mrs. Miller, a non-adversarial scenario, I would hold that, pursuant to its duty of good faith and fair dealing, Keystone had an affirmative obligation to disclose to its insured: that it had knowledge of the possibility of a claim for recovery; that the potential for an adversarial relationship existed; and that it was no longer acting in the interests of its unrepresented insured in this matter. In my opinion, this requirement would be a minor obligation given the alleged relationship of the parties that had theretofore involved a spirit of cooperation and trust.[3]

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[3] Contrary to the position of the Majority, I believe that, if Mrs. Miller can establish a basis for the duty that I and the Superior Court have described, Keystone's breach thereof would serve to toll the running of the statute of limita-

Accordingly, based upon the foregoing, I would affirm the decision of the Superior Court.

Thus, I respectfully dissent.

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tions in this matter under the principle of estoppel. My review yields no basis for the Majority's conclusion that Mrs. Miller cannot establish that she was fraudulently or deceptively lulled into a false sense of security, given the alleged actions, omissions and relationships of the parties, and the limited record developed prior to entry of summary judgment. To further support the dismissal of this claim on the basis that there was no discussion between Mrs. Miller and Keystone related to post-mortem survivor's benefits or the filing of a claim simply begs the question.

In addition, the Majority's attempt to further dismiss Mrs. Miller's claim on the basis that the "estate" possessed only a potential entitlement to benefits at the time Mrs. Miller filed her original claim for benefits is seriously flawed. As thoroughly described by the Superior Court herein, while this Court did not finally put to rest the issue of an estate's claim for work-loss benefits until *Freeze v. Donegal Mutual Ins. Co.*, 504 Pa. 218, 470 A.2d 958 (1983). *Freeze* did not change the law of Pennsylvania. It merely enforced what the No-fault Act had always required, and essentially only provided what this Court had implied in the *Heffner-Pontius* cases. Moreover, the question is not whether Keystone's insureds were able to recover between the *Heffner-Pontius* cases and the *Freeze* decision, but rather, whether Keystone had an obligation to inform them of the potential for recovery and that it was no longer acting in the interest of its unrepresented insureds. Finally, it is clear that as of the date of this Court's decision in *Freeze*, only three months had elapsed since Mrs. Miller received her last benefits, and quite conceivably *a full year* remained before the estate's claims would have been time barred. 402 Pa.Super. at 230-232, 586 A.2d at 944-45.

**Mary C. MILLER, Administratrix of the Estate of John R. Miller, Deceased; and All Others Similarly Situated, Appellants,**

**v.**

**KEYSTONE INSURANCE COMPANY.**

Superior Court of Pennsylvania.

Argued Jan. 17, 1990.

Filed Jan. 8, 1991.

Reargument Denied March 5, 1991.

Administrator of estate of insured sought to bring class action to force insurer to pay postmortem work loss benefits pursuant to No-fault Motor Vehicle Insurance Act of 1974. The Court of Common Pleas, Dauphin County, Civil Division, No. 26 S 1987, Morgan, J., granted insurer's motion for summary judgment as to administrator's individual claim, denied petitions to intervene, and denied motion for class certification. Appeal was taken. The Superior Court, No. 304 Harrisburg 1989, Ford Elliott, J., held that: (1) triable issues of fact were raised as to whether insurer breached duty of good faith and fair dealing by failing to inform administrator regarding estate's possible recovery of postmortem work loss benefits, and (2) petitions of intervenors did not establish right of intervention.

Appeals quashed in part; summary judgment vacated; case remanded.

Rowley, J., concurred in the result.

**1. Insurance 156(1)**

Insurer has duty to inform insured if potential for adversarial relationships exist and insurer may breach affirmative

duty of good faith and fair dealing if it fails to inform insured after assuming responsibility for processing insured's claims, if insurer knows that insured relies exclusively on insurer's advice and counsel and if insurer has knowledge regarding additional claim for benefit to which insured was entitled.

**2. Insurance 92.1, 156(1)**

Insurance agent's duty to obtain for estate all to which it was entitled was implicitly imposed on insurer and its agent by No-fault Act, even if agent did not specifically inform insured that he would do so; primary purpose of No-fault Act was to ensure that claimant would not need attorney to secure basic benefits.

**3. Insurance 156(1)**

Before duty of good faith may be imposed on insurer, insurer must know that insured is acting in reliance on insurer's advice and counsel.

**4. Insurance 665.3(4)**

Evidence showed that insurer was on notice that postmortem work loss benefits were subject to recovery by insured's estate at time estate claims were being processed which gave rise to duty on part of insurer to inform insured that estate had potential to recover those benefits for purposes of determining whether estate claims for postmortem work loss were time barred.

**5. Appeal and Error 95**

Trial court's conclusion that estate representatives could not intervene in action to establish insurance rights under No-fault Act was not appealable if denial of petitions to intervene did not operate as practical denial of relief obtainable in no other way. 40 P.S. § 1009.107 (Repealed); Rules Civ.Proc., Rule 2327, 42 Pa.C.S.A.

**6. Insurance 619**

Claim by personal representative of estate for additional work loss benefits which was not brought until more than two years after last payment of benefits under No-fault Act was time barred. Rules Civ. Proc., Rules 2327, 2329, 42 Pa.C.S.A.

**7. Limitation of Actions 72(1)**

While minority of insured's daughter tolled application of limitations period as to her claim, it did not affect estate's claim, and, thus, estate representative, whose claim against insured for postmortem work loss benefits was time barred, was not entitled to intervene in class action seeking recovery of postmortem work loss benefits.

**8. Limitation of Actions 72(1)**

Minority of daughter of insured did not operate to toll statute of limitations applicable to action for work loss benefits brought on behalf of deceased father's estate.

**9. Parties 40(2)**

Representative of estate of driver who was not "insured" within meaning of No-fault Act was not entitled to intervene in class action seeking recovery of postmortem work loss benefits from insurer. 40 P.S. § 1009.103 (Repealed).

**10. Parties 40(2)**

Representative of estate which had received survivor's loss benefits and work loss benefits was not entitled to intervene in class action seeking to recover postmortem work loss benefits from insurer, even if estate was owed interest; estate had already received full amount of postmortem work loss benefits to which it was entitled and thus claim was not identical to that of other class members. 40 P.S. § 1009.106 (a)(2) (Repealed).

Richard C. Angino, Harrisburg, for appellants.

A. Richard Feldman, Philadelphia, for appellees.

Before ROWLEY, FORD ELLIOTT and HOFFMAN, JJ.

FORD ELLIOTT, Judge:

Plaintiff/appellant Mary C. Miller, administratrix of the estate of her son, John Miller, who was killed in a motor vehicle accident on August 12, 1980, sought to bring a class action lawsuit to force defendant/appellee Keystone Insurance Company to pay post-mortem work loss benefits pursuant to the now-repealed No-fault Motor Vehicle Insurance Act, Act of July 19, 1974, P.L. 489, No. 176 §§ 101-701, 40 P.S. §§ 1009.101-1009.701 (Supp. 1982). Her motion for class certification was challenged by Keystone. In an attempt to ensure that the class would have a representative plaintiff, petitions to intervene and to become additional representative plaintiffs were filed by petitioners/appellants Deborah Steward, Danny Gilbert, Suzanne Shadler, and Phil Sanchez, all of whom were, or had applied to become, administrators of the estates of persons killed in automobile accidents.

In orders entered on May 16, 1989, the trial court granted Keystone's motion for summary judgment as to Mary Miller's individual claim; denied, on various grounds, all of the petitions to intervene; and denied the motion for class certification, as no representative plaintiff remained to lead the class. Judgment in favor of Keystone was entered on June 2, 1989.

In this timely appeal, appellants contend that the trial court erred in granting summary judgment against Mary Miller, in denying the petitions to intervene, and, consequently, in denying the motion for class certification.

I.

We turn first to appellants' challenge to the award of summary judgment in favor of Keystone and against Mary Miller. Pursuant to Pa.R.C.P. 1035(b), such a motion is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, along with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In ruling upon such a motion, the court must examine the record in the light most favorable to the nonmoving party and must resolve any doubt against the moving party. The court's function is not to decide issues of fact, but solely to determine whether there is such an issue to be tried. *Washington Federal Savings and Loan Association v. Stein*, 357 Pa.Super. 286, 288-89, 515 A.2d 980, 981 (1986).

John Miller, the son of Mary Miller, was the named insured on a No-fault automobile insurance policy issued by Keystone. Following his death in a motor vehicle accident on August 12, 1980, Keystone paid collision, funeral, and survivor's loss benefits with the last benefits being paid in April, 1982. Work loss benefits were not paid by Keystone and were not sought by Mary Miller until August 11, 1986, when she filed the complaint initiating the present action. In the complaint Mary Miller, as administratrix of her son's estate and representative plaintiff, sought post-mortem work loss benefits, plus interest and counsel fees, "for herself and the class which she represents."

In the opinion accompanying its orders of May 16, 1989, the trial court held that Miller's claim was barred by the statute of limitations as set forth in § 1009.106(c)(1) of the No-fault

Act, 40 P.S. § 1009.106(c)(1).[1] In this appeal, appellants do not dispute the trial court's interpretation of the applicable statute of limitations. Instead, they contend that Keystone knowingly misrepresented the benefits due to Mary Miller, thus breaching the duty of "good faith and fair dealing" as announced in *Dercoli v. Pennsylvania National Mutual Insurance Company*, 520 Pa. 471, 554 A.2d 906 (1989). Therefore, since Keystone's knowing misrepresentation was the cause of Miller's failure to bring a timely action to recover post-mortem work loss benefits, appellants argue, Keystone's action should operate to toll the statute of limitations and allow Miller to recover the benefits to which she is entitled.[2] Appellant's

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1. Section 1009.106(c)(1) states the following:

> If no-fault benefits have not been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two years after the victim suffers the loss and either knows, or in the exercise of reasonable diligence should have known, that the loss was caused by the accident, or not later than four years after the accident, whichever is earlier. If no-fault benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant; may be commenced not later than two years after the last payment of benefits.

2. At the outset, we note that some confusion exists as to the exact nature of the issue raised by appellants. In their Statement of Issues Presented, appellants assert that the issue concerns "the benefits due to Mary Miller arising out of the death of her son" (Brief for Appellant at 3). In their brief appellants assert, more precisely, that Keystone failed to inform Miller of the benefits to which she was entitled *as a dependent survivor*. However, as the following excerpts indicate, Miller's complaint reveals that she sought such benefits *on behalf of her decedent's estate*:

> 1. Plaintiff, Mary C. Miller, is the Administratrix of the Estate of John R. Miller....
>
> . . . . .
>
> 7. As a result of this accident, plaintiff's decedent's estate has suffered severe losses because decedent's untimely death caused immediate and complete loss of probable future income, which loss is defined as "work loss" under the ... No-Fault ... Act, 40 PS. § 1009.103.

*Dercoli* argument is premised on the theory that Keystone breached a duty of good faith and fair dealing to its insured, John Miller's estate, by failing to disclose the estate's entitlement to post-mortem work loss benefits at the time of processing the estate's claim for benefits.

In *Dercoli* our supreme court reiterated that it has long been the law of this Commonwealth that "the utmost fair dealing should characterize the transactions between an insurance company and the inured." *Dercoli, supra,* 520 Pa. at 477, 554 A.2d at 909, citing *Fedas v. Insurance Company of the State of Pennsylvania,* 300 Pa. 555, 559, 151 A. 285 (1930). Also see *Gray v. Nationwide Mutual Insurance Company,* 422

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. . . . .

9. No.* written rejection of plaintiff's decedent's estate's claim for no-fault work loss benefits was made by defendant as required by the No-Fault Act, 40 P.S. § 1009.106(a)(5).

. . . . .

12. Plaintiff avers that the defendant misled plaintiff into believing that her decedent's estate had no valid claim for work loss benefits.

13. Plaintiff avers that plaintiff justifiably but detrimentally relied on defendant's misrepresentations of the material fact that her decedent's estate had no valid claim for no-fault work loss benefits.

14. Plaintiff avers that defendant had no reasonable basis to believe that her decedent's estate was not entitled to no-fault work loss benefits in August, 1980, in light of appellate court decisions, including *Heffner* ..., which applied retroactively, and made it clear to defendant that plaintiff's decedent's estate was entitled to no-fault decedent work loss benefits.

The relief requested by Miller, "the representative plaintiff, for herself and the class which she represents," included, *inter alia*, ordering Keystone "to immediately pay to each decedent-insured's estate or relatives maximum wage loss benefits, plus eighteen percent accumulated interest to the time of payment. ..." The trial court understood Miller to have brought the action "on behalf of her son's estate and all others similarly situated ..." (Trial Court Opinion at 1). As appellants did not raise in the trial court the claim that Miller was entitled to recover post-mortem work loss benefits as the *survivor* of a deceased victim, we will not address such a claim in this appeal.

Pa. 500, 223 A.2d 8 (1966) and *Gedeon v. State Farm Mut. Auto. Insurance Company,* 410 Pa. 55, 188 A.2d 320 (1963). The *Dercoli* court then expanded this duty to require that insurers must deal fairly and openly with their insured even though such dealing may be adverse to their own interests.

*Dercoli* involved an automobile accident where the husband-insured fell asleep at the wheel which caused the vehicle to cross over the center-line of a highway and crash into the rear wheels of an oncoming tractor-trailer. The husband was killed instantly and his wife, the claimant, was injured severely. In her claim for insurance benefits, the wife relied solely on the advice of the agents of two separate insurance companies to receive the benefits due her under two separate policies held by her deceased husband.[3] While appellant was still receiving benefits and relying on the agents for advice, the supreme court decided *Hack v. Hack,* 495 Pa. 300, 433 A.2d 859 (1981), which abolished the defense of inter-spousal immunity in Pennsylvania as a bar to an action for personal injuries caused by the negligence of the injured victim spouse. Mrs. Dercoli subsequently learned of the applicability of the *Hack* decision to her case some four years later and instituted suit against the insurance carriers averring a breach of good faith and fair dealing for their failure to inform her of her newly created right to benefits following the *Hack* decision. In an

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3. In *Dercoli,* the wife was not seeking benefits as a representative of the estate of her deceased husband but rather in her own right as a claimant. Therefore, the court, by permitting Mrs. Dercoli to recover appears to apply the good faith and fair dealing standard broadly not only to insureds, but to claimants as well. But see *Dercoli v. Pennsylvania National Mutual Ins. Co.*, 369 Pa.Super. 289, 535 A.2d 163 (1987), Opinion by Brosky, J. which though recognizing the duty of insurer to act in good faith in relation to its insured, denied Mrs. Dercoli relief on this basis because of her status as an injured third party and not an insured. We need not concern ourselves with this question as we are dealing with a suit instituted by an insured.

opinion announcing the decision of the court, Justice Larsen held "[T]he duty of an insurance company to deal with the insured fairly and in good faith includes the duty of full and complete disclosure as to all of the benefits and every coverage that is provided by the applicable policy or policies along with all requirements including any time limitations for making a claim." *Dercoli, supra,* 520 Pa. at 478, 554 A.2d at 909.

Appellee argues that *Dercoli* should be given no precedential authority because Justice Larsen's opinion, joined in by former Justice Stout, expressed the views of only two justices.[4] However, appellee ignores that the Concurring Opinion, authored by Justice Papadakos, and joined in by Justice McDermott, is consistent with and adds further definition to the holding as enunciated by Justice Larsen. In concurrence, Justice Papadakos, initially disassociated himself from the lead opinion's statement that *Taglianetti v. Workmen's Compensation Appeal Board,* 503 Pa. 270, 469 A.2d 548 (1983), was decided wrongly,[5] however, he specifically concurred in the judgment of the court expressing general agreement with the reasoning set forth in the majority opinion. The thrust of his opinion countered the position taken by the dissent that the court's decision transformed insurance companies into legal service advisors for claimants.

The essence of the duty defined by both Justice Larsen's and Justice Papadakos' opinions is that when the insurer

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[4] Justice Papadakos filed a Concurring Opinion in which Justice McDermott joined, and Justice Flaherty authored a Dissenting Opinion joined by Chief Justice Nix and Justice Zappala.

[5] *Taglianetti* involved a suit by an employee against an employer for the employer's failure to inform the widow of the employee about potential claims and benefits under Workmen's Compensation. Finding no evidence of fraud or intentional misrepresentation, the majority of the court refused to impose such a duty solely based on the employer-employee relationship.

assumed the responsibility to provide Mrs. Dercoli with assistance and advice in securing all available benefits to which she was entitled under the policy, the insurer was required to deal with her in the spirit of good faith and fair dealing. This was so even though informing Mrs. Dercoli of the *Hack* decision was contrary to the insurer's own interests. As stated more succinctly by Justice Larsen:

> This is especially true where the insurer undertakes to advise and counsel the insured in the insured's claim for benefits. Under such circumstances, the insurer has a duty to inform the insured of all benefits and coverage that may be available *and of any adverse interest pertaining to the insurer's liability under the applicable policy.*

*Dercoli, supra,* 520 Pa. at 4, 554 A.2d at 909. (Emphasis added).

Contrary to appellee's contention, we find the duty enunciated in *Dercoli* to be a logical and rational one which flows from the relationship as it in fact exists between insurers and their insured. In *Dercoli,* Justice Larsen cited the California case of *Sarchett v. Blue Shield of California,* 43 Cal.3d 1, 233 Cal.Rptr. 76, 729 P.2d 267 (1987) as supportive of a finding of a duty on the insurer. We find the language of another California case cited in *Sarchett* equally instructive.

> Very recently, in *Egan v. Mutual of* Omaha *Ins. Co.* (1979) 24 Cal.3d 809, 157 Cal.Rptr. 482, 598 P.2d 452, we summarized these principles, noting first that in insurance contracts, as in all contractual relationships, "[i]n addition to the duties imposed on contracting parties by the express terms of their agreement, the law implies in every contract a covenant of good faith and fair dealing. [Citations.] The implied promise requires each contracting party to refrain from doing anything to injure the right

of the other to receive the benefits of the agreement. [Citation.] The precise nature and extent of the duty imposed by such an implied promise will depend on the contractual purposes." *Id.*, at 818, 157 Cal.Rptr. at 486, 598 P.2d at p. 456. In *Egan* we also pointed out that in handling claims submitted by its own insured, "[f]or the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the agreement, *[the insurer] must give at least as much consideration to the latter's interest as it does to its own.* [Citation.]" (Emphasis added.) *(Id.*, at 818-819, 157 Cal.Rptr. at p. 486, 598 P.2d at p. 456.)

One important facet of the insurer's obligation to give the insured's interest "as much consideration ... as it does ... its own" is the duty reasonably to inform an insured of the insured's rights and obligations under the insurance policy. In particular, in situations in which an insured's lack of knowledge may potentially result in a loss of benefits or a forfeiture of rights, an insurer has been required to bring to the insured's attention relevant information so as to enable the insured to take action to secure rights afforded by the policy.

*Davis v. Blue Cross of Northern California*, 25 Cal.3d 418, 158 Cal.Rptr. 828 at 833-34, 600 P.2d 1060 at 1065-66 (1979).[6]

[1] We are mindful of the dissent by Justice Flaherty in *Dercoli*, which suggests that "[i]t has always been the case that insurance companies, insureds and claimants are potential adversaries." *Dercoli, supra*, 520 Pa. at 483, 554 A.2d at 912. While the potential for conflict may always be present, we

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6. See generally, Barker, *The Scope of the Emerging Duty of First-Party Insurers to Inform Their Insureds of Rights Under the Policy*, 25 Tort and Insurance Law Journal, No. 4 at 749 (1990).

agree with appellant herein, that insurers when selling insurance or representing their insured in court do not present themselves in an adversarial light. Can there be any doubt about this when in soliciting business, the consumer is persuaded that insurers are "on their side" and that they are "in good hands." It should be stated that most insurance agents and brokers approach their relationship with their insured in this spirit of cooperation and trust. Therefore, is it so great a duty to impose on an insurer that if the potential for an adversarial relationship exists, it is under an obligation to so advise its own insured. And failing to do so, may not an insurer be held to have breached an affirmative duty imposed by its contract of insurance of good faith and fair dealing.

The imposition of the duty in *Dercoli* was premised on three factors: (1) the insurer had assumed the responsibility for processing its insured's claims; (2) the insurer knew that the insured was relying exclusively on its advice and counsel; and, (3) the insurer had knowledge regarding an additional claim for benefits to which Mrs. Dercoli was entitled and it failed to disclose such information.

Having so defined the duty in *Dercoli,* we must now decide whether evidence exists in the instant case, that Keystone was under a duty to inform Mrs. Miller of any information of which it had knowledge regarding recovery of post-mortem work loss benefits by the estate of her son at some time before the Statute of Limitations ran on the estate's claims.

We first look to whether Keystone assumed the responsibility for processing the claims of its insured's estate. In *Dercoli,* it was significant that the insurer had undertaken to advise and counsel the insured in the insured's claim for benefits. Keystone would argue that *Dercoli* should be limited

to those situations when an insurer volunteers to act as legal counsel for its insured. We disagree. If the duty on an insurer can be imposed only because it assumes the role of legal advisor, then that duty should rise to a level much greater than good faith and fair dealing.

[2] As stated by Justice Papadakos in his concurrence in *Dercoli:*

> After all, the law does not favor a volunteer. It is simple black letter law that where one gratuitously undertakes *to render legal or other services* and then does so in a careless or negligent way, causing harm, liability attaches.

*Dercoli, supra,* 520 Pa. at 482, 554 A.2d at 911. (Emphasis added). Although we recognize in the instant case that Keystone's agent did not specifically inform Mrs. Miller that he would obtain for the estate all to which it was entitled, we find this responsibility implicitly imposed upon Keystone and its agent by the No-fault Act itself. It is very significant that one of the primary purposes of the No-fault Act was to insure that a claimant would not need an attorney to secure basic benefits, and to this end, the burden was placed on the insurer to investigate and pay claims. The scheme of the Act encouraged claimants to place their trust and reliance in their insurance companies to see to it that their claims would be handled properly, and that they would receive *all to which they were entitled under the Act.*[7] A necessary corollary of this reliance was that insurers would handle and process claims in good faith and in the best interests of the claimant in a nonadversarial relationship. Additionally, there is at least some evidence

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7. Contrary to appellee's argument and assuming that the insured has supplied all necessary information to its insurer for the processing of claims, it logically follows that an insured does not need to make a specific demand for services or benefits to which the insured is entitled.

in the instant case that Keystone voluntarily assumed the processing of Mrs. Miller's claim in that it is alleged that the statement of benefits which was submitted by Mrs. Miller actually was prepared by an agent of Keystone.

[3] However, our inquiry does not end here. *Dercoli* also requires that before a duty may be imposed on the insurer, the insurer must know that the insured is acting in reliance upon its advice and counsel. We find it an important consideration in the imposition of the *Dercoli* duty that an insured not be represented by legal counsel in the processing of the claims. It is implicit in imposing the *Dercoli* duty that an insurer in counseling an unrepresented insured recognize that its level of information is most likely greater than that of the insured. Not only are insurers at an advantage in terms of differing legal interpretations on coverage issues, but insurers have the additional benefit of their own legal counsel when processing claims. Instantly, it is alleged in appellant's complaint that counsel was retained sometime after the processing of the estate's claims. It is for the appellant to establish on remand that she was unrepresented at the relevant time in question and that Keystone had knowledge of this and knew that she was relying on its agent's advice.

We now turn to the third prong of the *Dercoli* duty defined herein as to whether there is any evidence that Keystone had information regarding additional benefits to which the Miller estate was entitled and it failed to disclose such information prior to the claim being time barred. Specifically, did Keystone have a duty to disclose to Mrs. Miller that the estate should present a claim for post-mortem work loss benefits?

Appellee cites this court's decision in *Gabovitz v. State Auto. Ins. Assn.*, 362 Pa.Super. 17, 523 A.2d 403 (1987) as

controlling on this issue. However, we find *Gabovitz* to be distinguishable factually and to some degree repudiated by *Dercoli*. Like the case herein, *Gabovitz* involved a class action suit instituted by the executrix on behalf of her deceased husband's estate and those similarly situated to recover post-mortem work loss benefits under the No-fault Act. But this is where the similarity ends.

The factual basis of the appeal to this court from the grant of summary judgment in favor of State Auto was as follows.

> Albert Gabovitz sustained fatal injuries in a motor vehicle accident on February 18, 1976. He was insured pursuant to a policy of no-fault insurance which had been issued by State Auto. In April of 1976, Juliana Gabovitz, acting as executrix of her deceased husband's estate, filed a claim with State Auto to recover funeral and survivor's benefits. These were promptly paid by State Auto. Over four years later, on November 26, 1980, Gabovitz caused a letter to be sent to State Auto demanding payment of work loss benefits. State Auto denied this claim. Consequently, on December 1, 1980, Gabovitz commenced an action on behalf of her decedent's estate to recover work loss benefits from State Auto. Later, on June 22, 1982, she filed a class action seeking recovery of post-mortem work loss benefits on behalf of her husband's estate and also on behalf of the estates of all insureds of State Auto who had died in automobile accidents following passage of the No-fault Act.

*Gabovitz, supra,* 362 Pa.Super. at 20, 523 A.2d at 404-05.

Mrs. Gabovitz argued to this court that State Auto should be estopped equitably from asserting the defense of statute of limitations because the insurance company induced her to refrain from filing her action within the time allowed. The

panel denied Mrs. Gabovitz' relief on appeal finding that without "expressly proved fraud, there can be no estoppel based on the acts or conduct of the party sought to be estopped, where they are as consistent with honest purpose and with absence of negligence as with their opposites." *Gabovitz, supra,* 362 Pa.Super. at 23, 523 A.2d at 406 citing *In re Tallarico's Estate,* 425 Pa. 280, 288, 228 A.2d 736, 741 (1967). The court found no support in the record for Mrs. Gabovitz's allegation that State Auto had made oral representations that post-mortem work loss benefits were not recoverable and that even if agents of State Auto had made such representations, they would have represented nothing more than expressions of legal opinion. We agree with this analysis by our colleague, Judge Wieand. In 1976, when the estate's claim was processed by State Auto there was no allowable recovery of post-mortem work loss benefits. Even the *Dercoli* duty to inform would not require an insurer to anticipate future developments in the law or to predict future entitlements to benefits. It is fair to posit that the *Dercoli* court would not have imposed a duty on the insurer to have anticipated the *Hack* decision. Rather it is because *Hack* was decided while Mrs. Dercoli's claims still were being processed that the insurer had an affirmative duty to inform her that she was entitled to an additional claim for benefits or at least that their relationship had become adversarial. Under the facts of *Gabovitz,* the estate's claim for post-mortem work loss benefits was time barred by April, 1980, even before the Pennsylvania Supreme Court decided the *Heffner, infra,* and *Pontius, infra,* cases. In 1976, without proof of more, the insured and insurer had equal information regarding whether post-mortem work loss benefits someday would be recoverable by an estate.

Appellee herein cites *Gabovitz* for the additional proposition that there is no affirmative duty to inform imposed by

the No-fault Act. However, we find that such a broad reading of *Gabovitz* is inappropriate. In context, Judge Wieand stated the following.

> The final ground asserted by Gabovitz in support of her equitable estoppel argument concerns the failure of State Auto to give her formal notice in April of 1976 that it would not pay her post-mortem work loss benefits. She concedes that she did not request payment of such benefits until November of 1980. *Nevertheless, she argues, State Auto had an affirmative duty to inform her, at the time she filed her original claim for benefits in April of 1976, of all possible benefits, including those which were not then recognized.* We reject this argument. No such duty was imposed upon insurers by the No-fault Act, and we decline to recognize such an obligation here. To do so would impede rather than expedite the processing of no-fault insurance claims and, in so doing, would violate one of the primary objectives of the No-fault Act. Neither fraud nor deception can be implied merely because an insurance company awaited a specific demand for post-mortem work loss benefits before giving formal notice to its insured that such benefits would not be paid.

*Gabovitz, supra,* 362 Pa.Super. at 25, 523 A.2d at 407. (Emphasis added). We are in agreement that no duty should have been imposed on an insurer in 1976, to anticipate the *Heffner, Pontius* and *Freeze, infra,* decisions. Moreover, under the duty we impose today, we would reach the same conclusion as did the court in *Gabovitz.*[8]

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[8] Additionally, appellee cites this court to *Jones v. Keystone Ins. Co.*, 364 Pa.Super. 318, 528 A.2d 177 (1987). We find no application of the holding in *Jones* to the instant case.

[4] However, we find that the instant case presents a very different factual context than that found in *Gabovitz*. Based on the evidence admitted below, there would appear to be a stronger argument that in 1980 when the Miller estate claims were being processed, or even more definitely prior to the estate's claims being barred, Keystone was on notice that post-mortem work loss benefits were subject to recovery by an insured's estate.

On September 22, 1980, prior to the Miller estate's claims being processed, our supreme court decided the companion cases of *Allstate Insurance Company v. Heffner* and *Pontius v. United States Fidelity and Guaranty Company*, 491 Pa. 447, 421 A.2d 629 (1980). *Heffner* concerned a claim for work loss benefits brought by the survivor of a deceased victim. The trial court granted judgment on the pleadings in favor of the insurer, and this court reversed. *Heffner, supra*, 265 Pa.Super. 181, 401 A.2d 1160. *Pontius* concerned a claim for work loss benefits brought by the administrator of a deceased victim's estate. The trial court sustained the insurer's preliminary objections in the nature of a demurrer, and this court, in an unreported and non-precedential decision, reversed. The supreme court affirmed the orders of this court in both cases. *See* 491 Pa. 447, 421 A.2d 629.

It cannot be denied that the insurance industry in this Commonwealth was aware fully of the appellate activity on these interpretive issues under the No-fault Act in 1980. In fact, the supreme court in the *Heffner* and *Pontius* appeals had the benefit of amicus briefs from the Pennsylvania Trial Lawyers, filed on behalf of the appellee Heffner, and from the Insurance Federation of Pennsylvania, the National Association of Independent Insurers, and the American Insurance

Association, filed on behalf of both Allstate and United States Fidelity and Guaranty Company.

We find more specifically, that an internal memorandum written on October 21, 1980, by an adjuster working for Keystone to the claims representative, regarding the nature of information disclosed to Mrs. Miller, is at least some evidence, that Keystone was aware of the changing law in this area. This memorandum read as follows:

> As you have indicated in our telephone conversation of 10-20-80 that Mary Miller (mother of the deceased insured) would be entitled to survivors* benefits which according to your Philadelphia office would involve a monthly check of $135.00 until the $5,000 survivors* benefit is exhausted we have notified Mrs. Miller that she will be receiving monthly payments shortly in that regard. In addition, we made no mention to Mrs. Miller as discussed pertaining to possible benefits for lost wages and will merely await developments in that regard.

We find the interpretation and effect of this memorandum a matter for the trier of fact.[9]

The issue of viability of the estate's claim for benefits was put to rest by this court's subsequent decision in *Freeze v.*

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[9] Appellee argues in its brief that this memorandum was inadmissible as work product and privileged under Pa.R.C.P. 4003.3 since it contains the adjuster's mental impressions, conclusions or opinions respecting the value and merit of a claim or defense or respecting strategy or tactics. Although we decline to make an evidentiary ruling concerning the insurer's internal memorandum on appeal, we do believe that it could be admitted properly at trial concerning the issue of when the insurer had knowledge of an estate's right to post-mortem work loss benefits. Pa.R.C.P. 4003.1-4003.3; 6 Standard Pennsylvania Practice 2d § 34:28, § 34:31; *See also Nedrow v. Pa. Nat. Mut. Cas. Ins. Co.*, 31 Pa.D. & C.3d 456 (1981); *Pile v. Nationwide Mut. Ins. Co.*, 35 Som.Leg.J. 326 (1978); *Whitehead v. Allstate Ins. Co.*, 3 Pa.D. & C.3d 56 (1977).

*Donegal Mutual Ins. Co.*, 301 Pa.Super 344, 447 A.2d 999 (1982.) In its argument to this court in *Freeze*, the insurer requested that this court repudiate the language in *Heffner* as it might be applied to an estate's entitlement to work loss benefits. Discussing the impact of the supreme court's affirmance in the *Pontius* case, then President Judge Cercone, who also authored this court's decision in *Heffner*, stated:

> [s]trictly speaking the foregoing quotation was dictum to our opinion in *Heffner v. Allstate Ins. Co.* since the plaintiff in that case was the deceased victim's widow and not the estate. However, the plaintiff in *Pontius* was the administrator of the deceased victim's estate. In reversing the lower court's decision in our order filed in *Pontius* we relied on our opinion in *Heffner v. Allstate Ins. Co.* Our Supreme Court never directly addressed the question of whether a deceased victim's estate may recover under the No-fault Act, however, it did affirm both our decision in *Heffner v. Allstate Ins. Co.* and our order in *Pontius*. Furthermore, the Supreme Court adopted much of our opinion in *Heffner v. Allstate Ins. Co.* as its own. From the tenor of the Supreme Court's opinion in *Allstate Ins. Co. v. Heffner, supra,* and from its affirmance sub silentio in that case of our decision in *Pontius* that a deceased victim's estate may recover under the Act, we conclude that what was dictum in our earlier opinion must properly be applied to this case and become our holding.... There, we termed the result advocated by the insurance company "untoward" and "legislatively unintended." *Id.* We are no less convinced of the correctness of our position in *Heffner v. Allstate Ins. Co.* today than we were two years ago. Indeed, in light of *Allstate Ins. Co. v. Heffner, supra,* we stand the firmer yet behind our conviction that the Legislature intended no such result. We hold today that

> the estate of a deceased victim is entitled to recover work loss benefits under the No-fault Act.

*Freeze, supra,* 301 Pa. Super. at 353-54, 447 A.2d at 1004.

The supreme court affirmed this court's holding on the entitlement of an estate to post-mortem work loss benefits in an opinion filed December 30, 1983, describing the result as a "natural, logical and compelling extension of our holding in *Heffner.*" *Freeze v. Donegal Mutual Insurance Company*, 504 Pa. 218, 222, 470 A.2d 958, 960 (1983).

It is noted at this point that this court's decision in *Freeze* was filed just three months after Mrs. Miller received her last benefits and a full year before the estate's claims would have been time barred. However, the question before this court on the imposition of the *Dercoli* duty is not whether Keystone's insureds were able to recover between the *Heffner-Pontius* cases and the *Freeze* decisions but rather whether Keystone had an obligation to inform its insureds that it had knowledge of the potential for such recovery, and that it was no longer acting in the interests of its unrepresented insureds in this matter. As noted earlier, Keystone's own internal memorandum is strong evidence of its decision not to disclose this fact. Although broader in scope than the question we face today, there may be some analogy to this case in the reasoning of Senior Judge Vanartsdalen, in *Kromnick v. State Farm,* No. 85-5824, slip op. at 57-58, 1990 WL 1407 (E.D.Pa. Jan. 10, 1990).

> State Farm argues that until the *Freeze* decision in 1983, there was no binding caselaw from the Pennsylvania Supreme Court requiring payment of post mortem work loss benefits to decedent's estates, and therefore it should not be held liable to a duty not yet announced. The short answer to that argument is that there was no caselaw to

> the contrary. *Freeze* did not change the law of Pennsylvania. It merely decided what the statute had always required. State Farm, and all other insurers who may have acted similarly, merely relied upon their own interpretation of the statute, which was determined by *Freeze* to be a totally incorrect interpretation. State Farm made conscious and deliberate decision to say nothing to claimants about possible work loss benefits so as "not to agitate or aggravate" claimants .... In other words, State Farm took the risk in the hope that by the time a claimant might become aware of a right to claim, it would be time barred.... Finally, it may be contended that the *Dercoli* doctrine of advising claimants of potential claims should not be made retroactive. However, *Dercoli* itself considers the retroactivity of *Hack v. Hack* and concludes nevertheless that *Hack v. Hack* should operate retroactively so as to remove the bar of the statute of limitations. I predict that the Supreme Court of Pennsylvania would conclude that *Dercoli* should apply retroactively when the effect would be to toll the statute of limitations because of the failure of State Farm to timely advise claimants of their right to work loss benefits.

In conclusion, we agree with appellant that there is at least some evidence for the imposition of the *Dercoli* duty of good faith and fair dealing in this case; therefore, we vacate the summary judgment entered below. However, we recognize that since *Dercoli* was decided after presentation of appellant's claim to the trial court, and prior to the filing of this appeal, the trial court has not had an opportunity to consider this issue. Therefore, our reversal today is not a reflection of that court's disposition of the statute of limitations question. But for allegations of a breach of good faith and fair dealing as enunciated in *Dercoli*, the instant case would be time barred.

Also, it is on this basis that we will not find waiver of the duty of good faith issue. In her complaint, Mrs. Miller, at all times contended that Keystone withheld information; therefore, the factual basis for the breach of duty claim has been pled sufficiently.

II.

We next consider the trial court's denial of the petitions to intervene of Deborah Steward, Suzanne Shadler, Danny Gilbert, and Phil Sanchez. The trial court considered each of the four petitions to intervene separately on its merits.

The trial court denied the petition to intervene of Deborah Steward. The trial court found that the Steward claim was time-barred.

The trial court denied the petition to intervene of Suzanne Shadler. The court found that the petitioner failed to establish that she was an "insured" as the term is utilized in the class definition and therefore had failed to sustain her burden of proving all of the allegations as set forth in her petition. The court also found that, in any event, her claim was time-barred.

The trial court denied the petition to intervene of Danny Gilbert. The trial court found that the petitioner failed to establish that the decedent had not already received full No-fault work-loss benefits and as such did not sustain his burden of proving all of the allegations set forth in his petition to intervene.

The trial court denied the petition to intervene of Phil Sanchez. The court based its decision on multiple grounds, including: (1) the action was barred by the doctrine of *lis pendens;* (2) the petitioner failed to sustain his burden of proving all of the allegations set forth in his petition to inter-

vene in that he did not establish that decedent was an "insured" as the term is utilized in the class definition; and, in any event, (3) had the petition to intervene been adequately supported, refusal of permission to intervene would have been justified pursuant to Pa.R.C.P. 2329(2) since the petitioner's interest were* already adequately represented.

Petitioners timely filed this appeal to the above orders. On appeal, appellants allege that the trial court erred in denying the above petitions.[10]

We first consider this court's role in reviewing the denial of the petitions to intervene filed by Steward, Shadler, Gilbert and Sanchez.

The initial issue to be decided is whether the orders denying the petitions were final and therefore appealable. If they are not, the appeals must be quashed. The decision as to whether to quash an appeal as interlocutory is often done without reference to the merits of the case since many orders, by their very nature, lack any indicia of finality. However, in some cases, including the one which we now consider, the decision whether to quash is intertwined with a consideration of the merits. This is due to the fact that the "finality and therefore the appealability of the orders is a judicial conclusion which can be reached only after an examination of its ramifi-

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10. At this juncture, we note a procedural defect in this appeal which appellee argued in a motion to quash subsequently denied by this court on December 5, 1989. Counsel for appellants filed only one notice of appeal, listing all appellants at No. 304 Hbg. 1989, from the May 16, 1989 order of the trial court. This is in violation of Pa.R.A.P. 512. This is not a *joint appeal*. The trial court entered separate orders denying each petitioner-appellant's motion to intervene on different grounds. A separate appeal was required to be filed by each petitioner-appellant and the appeals would have been subject to consolidation for briefing and argument under Rule 513. However, this court may refrain from quashing on the basis of this defect on our own discretion. *See General Electric Credit Corporation v. Aetna Casualty and Surety Company*, 437 Pa. 463, 263 A.2d 448 (1970).

cations." *Richards v. Trimbur,* 374 Pa.Super. 352, 358, 543 A.2d 116, 119 (1988) (citations omitted). The rule used to determine the appealability of orders denying a petition to intervene is well established in Pennsylvania.[11] The Pennsylvania Supreme Court has stated:

> '[A]s a rule an appeal will not lie from an order refusing leave to intervene, because such an order is not a final one [but] cases may arise where a denial of a petition to intervene would be a practical denial of relief to which the petitioner for intervention is entitled and can obtain in no other way; and in such cases the refusal to permit an intervention is a final order or decree as to the petitioner. *Frey's Estate,* 237 Pa. 269, 271, 85 A. 147, 148 (1912).' (citations omitted).

*Scharnitzki v. Bienenfeld,* 368 Pa.Super. 610, 611, 534 A.2d 825, (1987); *See also Boise Cascade Corporation v. East Stroudsburg Savings Association,* 300 Pa. Super. 279, 281, 446 A.2d 614, 615 (1982), quoting *Frey's Estate,* 237 Pa. 269, 271, 85 A. 147, 148 (1912). It is the examination of the merits which determines whether there has been a practical denial of relief.

**[5]** The trial court concluded that appellants either were not parties to the class action or in the alternative were not parties entitled to relief. If, upon an examination of the merits, we determine the trial court was correct, the order appealed from is not final as to the parties and therefore not appealable. We now turn to the merits of appellants' petitions to intervene.

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11. The propriety of such rules governing interlocutory appeals is established by Pa.R.A.P. 311(a)(7).

III.

The determination of who may intervene in an action and when that intervention may be prohibited is determined by Pa.R.C.P. 2327 and 2329. Rule 2327 states:

> At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if—
>
> (1) the entry of a judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
>
> (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or an officer thereof; or
>
> (3) such a person could have joined as an original party in the action or could have been joined therein; or
>
> (4) the determination of such action may affect any legally enforceable interest of such person whether or not he may be bound by a judgment in the action.

However, even if a petitioner fulfills the requirements of Rule 2327, they can be excluded from intervening in the suit by a showing that they fall into one of the three categories set forth in Pa.R.C.P. 2329, which reads as follows:

> Upon the filing of the petition and after hearing, of which notice shall be given to all parties, the court, if the allegations of the petitions have been established and are found to be sufficient, shall enter an order allowing intervention; but an application for intervention may be refused, if
>
> (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or

(2) the interest of the petitioner is already adequately represented; or

(3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.[12]

The cases of the four petitioners will be addressed *seriatim.*

A. Deborah Steward

Deborah Steward is the personal representative of the estate of her deceased husband, Robert Steward, who was killed in a motor vehicle accident on July 17, 1981. Robert Steward was insured under a No-fault policy issued by Keystone. The trial court noted in its opinion that Keystone paid funeral benefits, survivor's loss benefits, and some amount of work loss benefits to Steward. The last of these payments was made December 3, 1982. As the trial court explained, our supreme court held, in *Sachritz v. Pennsylvania National Mutual Casualty Insurance Company,* 500 Pa. 167, 455 A.2d 101 (1982), that work loss benefits arise "otherwise than from death." Because Steward had received payments "for loss arising otherwise than from death," 40 P.S. § 1009.106(c)(1) of the No-fault Act, specified that she had two years after the last payment of those benefits within which to bring a claim for additional work loss benefits. Steward's claim for additional work loss benefits was not brought until August 8, 1988, when she filed her petition to intervene in the action brought by Mary Miller. Therefore, the trial court held that her claim was barred by the statute of limitations.

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12. For a more detailed exploration on the relationship between Rules 2327 and 2329 including the burden of proof issues, *See Egenreider, et al. v. The Ohio Casualty Group, et al.* No. 327 Harrisburg 1989 (filed October 16, 1990.)

[6] Appellants contend that the trial court's holding was based on an erroneous reading of the supreme court's opinion in *Sachritz*. To the contrary, it is appellants who have misread the opinion. The supreme court in *Sachritz* did not say that only *pre-death* work loss benefits arise otherwise than from death. Instead, the court explicitly stated that "post-mortem" work loss benefits "arise 'otherwise than from death,' specifically from the work loss resulting from the effects of the covered injury, for which benefits are not terminated by death under *Heffner.*" *Id.* at 171, 455 A.2d at 103-4. Accordingly, the trial court's interpretation of the statute of limitations was correct.

Appellants maintain that even if Steward's claim was governed by a two-year statute of limitations, the limitations period was tolled by the minority of Steward's daughter, who was eleven years old when her father died. Section 1009.106 (c)(5) of the No-fault Act, 40 P.S. § 1009.106(c)(5), provides that if a person entitled to no-fault benefits is under a legal disability when the right to bring an action for such benefits first accrues, the period of disability will be excluded from the limitations period. In support of their claim, appellants cite this Court's opinion in *Patterson v. Nationwide Mutual Insurance Company*, 358 Pa.Super. 167, 516 A.2d 1235 (1986), *alloc. denied*, 515 Pa. 582, 527 A.2d 543 (1987), for the proposition that "the minority of a dependent survivor is such a legal disability as to toll the statute of limitations." (Brief for appellants at 32).

[7, 8] The trial court held, and Keystone argues in this appeal, that "the daughter's minority tolls the statute as to *her* claim, but does not affect the estate's claim, the claim presently at issue" (Trial Court Opinion at 12 n. 6; emphasis in original). We agree. In *Patterson v. Nationwide, supra*, this Court held

that the plaintiff/appellee, the minor daughter of an individual killed in a motor vehicle accident, was entitled to recover work loss benefits in her capacity as the decedent's survivor and that the statute of limitations applicable to her action to recover such benefits had been tolled by her minority *Id.* at 175-77, 516 A.2d at 1240-41. There is no suggestion in the opinion that the daughter's minority would also operate to toll the statute of limitations applicable to an action for work loss benefits brought on behalf of her deceased father's estate. As this court has observed in a somewhat different context, "the distinction [between the status of 'survivor' and the status of 'representative of an estate'] is quite real and must be assiduously protected." *Billman v. Pennsylvania Assigned Claims Plan,* 355 Pa.Super. 524, 534 n. 9, 513 A.2d 1046, 1051 n. 9 (1986) *(en banc), alloc. denied,* 515 Pa. 571, 527 A.2d 533 (1987).

Finally, appellants object to "[t]he Trial Court's limitation of this case to recovery for estates" (Brief for Appellant at 34). The complaint filed by Mary Miller is not so limited, appellants assert, but instead defines the class as including "all persons who have not recovered full work loss benefits, full interest, and attorney's fees through Court-approved settlements" (Brief for Appellant at 33). Appellants note that the relief sought in the complaint included ordering Keystone to pay maximum wage loss benefits plus interest "to each decedent-insured's estate or relatives" and, in the future, to pay promptly for wage loss benefits "for decedents." They contend that the class description and the phrases "estate or relatives" and "for decedents", as well as "the judicial economy that class actions foster" (Brief for Appellants at 33-34), militate against limiting the class to estates.

Appellants' argument is not persuasive. We note, first, that appellants' assertion that the class includes *all persons*

who have not recovered work loss benefits, interest, and attorney's fees is a misstatement. As stated in the complaint, the class includes "*all insureds of defendant* who were covered by the Pennsylvania No-Fault Act with respect to *their* fatal injuries" (emphasis added). By choosing this language, appellants have indicated that it is the insureds (i.e., the decedents), and not their survivors, who constitute the class. "A personal representative in the person of the executor or administrator of [the] estate stands in the shoes of the deceased victim as far as entitlement to benefits is concerned." *Freeze, supra,* 504 Pa. at 224, 470 A.2d at 961. *See also Billman v. Pennsylvania Assigned Claims Plan,* 355 Pa.Super. at 533, 513 A.2d at 1050 (survivor, unlike an estate, does not stand in shoes of a deceased victim).

In addition, as noted in Part I of this opinion, the complaint avers that Mary Miller is the administratrix of the estate of John R. Miller; that "plaintiff's decedent's estate has suffered severe losses"; that Keystone gave no written rejection of "plaintiff's decedent's estate's claim for no-fault work loss benefits"; that Keystone "misled plaintiff into believing that her decedent's estate had no valid claim for work loss benefits"; and that Keystone had no reasonable basis for believing that plaintiff's decedent's estate was not entitled to no-fault work loss benefits in light of the *Heffner* decision, which made it clear that the estate was entitled to recover such benefits. With regard to the class as a whole, the complaint avers that the "question of law or fact raised in the instant action are common to all members of the class" and that the claims of Miller as representative plaintiff are typical, if not identical, to the claims of the class. We note also that each of the would-be intervenors is described in his or her petition to intervene as being, or having filed an application to become, the personal representative of the estate of the decedent, and each avers

that Keystone misled him or her into believing that the decedent's estate had no valid claim for work loss benefits.

We conclude, therefore, that it is not the trial court but appellants themselves who, in drafting the complaint and the petitions to intervene, have limited the case to estates. The trial court merely accepted the definition of the class that had been chosen by appellants. We agree with its determination. *See Egenrieder v. Ohio Casualty Group,* 365 Pa.Super. 400, 529 A.2d 1118 (1987) (for purpose of determining tolling effect of prior class action, court will not expand scope of plaintiff class in prior action beyond definition given in complaint in prior action).

Accordingly, following a review of the merits of Steward's petition, it is denied.

B. Suzanne Shadler

[9] Suzanne Shadler is the administratrix of the estate of Jeffrey Miller, who was killed in a motor vehicle accident on September 11, 1981. Miller was the father of Shadler's minor child. The car Miller had been driving was owned by Shadler's mother, to whom Keystone had issued a policy of automobile insurance pursuant to the No-fault Act. The trial court denied Shadler's petition to intervene on the grounds that Miller was not a member of the class of "insureds" and that Shadler's claim was barred by the statute of limitations.

As noted in our discussion of Deborah Steward's petition to intervene, the class action allegations in appellants' complaint averred that the class of plaintiffs "includes *all insureds* of defendant who were covered by the Pennsylvania No-fault Act with respect to their fatal injuries. ..." (Emphasis added). In the definitions section of the No-fault Act, "insureds" is defined as follows:

> (A) an individual identified by name as an insured in a contract of basic loss insurance complying with this act; and
>
> (B) a spouse or other relative of a named insured, a minor in the custody of a named insured, and a minor in the custody of a relative of a named insured if—
>
> (i) not identified by name as an insured in any other contract of basic restoration insurance complying with this act; and
>
> (ii) in residence in the same household with a named insured.
>
> An individual is in residence in the same household if he usually makes his home in the same family unit, even though he temporarily lives elsewhere.

40 P.S. § 1009.103. Appellants do not dispute the trial court's ruling that Jeffrey Miller was not an "insured" within the meaning of the No-fault Act. They contend, however, that the term was used in the class action complaint in accordance with its general usage and meaning, i.e., "one covered by insurance," and that Miller, and therefore Shadler fell within the ambit of the term as so defined.

It cannot be argued that the class action complaint was drafted without knowledge of the definitions provided in the No-fault Act, since, as the trial court noted in its discussion of Phil Sanchez's petition to intervene, "[appellants'] counsel is well acquainted with the no-fault post-mortem work loss benefits class action processes" (Trial Court Opinion at 10). Therefore, it is more reasonable to assume that appellants intended the term "insured" to have the meaning specified in the Act than it is to assume that they intended it to have a different meaning which they left unspecified.

The conclusion is bolstered by the Act's provisions for the payment of benefits to uninsured accident victims. Section 1009.204(a) of the No-fault Act provides that "[t]he security for the payment of basic loss benefits applicable to an injury to: .... (3) the driver or other occupant of a motor vehicle involved in an accident resulting in injury who is not an insured is the security covering such vehicle. ... " 40 P.S. § 1009.204(a). As Jeffrey Miller, at the time he sustained his fatal injury, was an uninsured individual who was driving a car insured under a policy issued by Keystone, any obligation of Keystone to pay basic loss benefits to Miller would have to be based upon this provision of the Act. Appellants' argument, therefore, would require us to hold that Miller is to be considered an *uninsured* for the purpose of entitlement to basic loss benefits pursuant to § 1009.204(a)(3) and an *insured* for the purpose of participation in the class action lawsuit. We consider it more reasonable to hold that Miller was not a member of the class as defined by appellants. For this reason, we agree with the trial court's denial of Suzanne Shadler's petition to intervene was, for that reason, proper. Our resolution of this issue makes it unnecessary for us to consider the statute of limitations applicable to Shadler's petition. The Petition to Intervene is thus denied.

C. Danny Gilbert

**[10]** Danny Gilbert is the administrator of the estate of his brother, Brian Gilbert, who died in a motor vehicle accident on November 23, 1984. On December 17, 1984, Keystone paid Brian Gilbert's estate $5,000 in survivor's loss benefits. Keystone subsequently concluded that it was not obligated to pay such benefits because the required proof of the survivor's dependency on the victim had not been received. Therefore, Keystone decided to treat the survivor's loss payment as

part of its admitted obligation to pay $15,000 in work loss benefits. The Company subsequently paid an additional $10,000 in work loss benefits. The trial court, after pointing out that, in any event, it is the survivor and not the estate who would be entitled to survivor's loss benefits, denied Gilbert's petition to intervene on the ground that the Gilbert estate had already received the $15,000 in work loss benefits owed to it.

Appellants contend that Keystone still owes $5,000 in work loss benefits to the Gilbert estate. They argue that the payment of $5,000 in survivor's loss benefits was proper under then-existing case law and, further, that a "setoff" of survivor's loss benefits against work loss benefits is prohibited by §1009.106(e) of the No-fault Act, which states that "[e]xcept as otherwise provided in this Act, basic loss benefits shall be paid without deduction or setoff." 40 P.S. § 1009.106(e).

Both prongs of appellants' argument are incorrect. In *Chesler v. Government Employees Insurance Company*, 503 Pa. 292, 469 A.2d 560 (1983), *judgment modified* on *other grounds*, 504 Pa. 426, 475 A.2d 102 (1984), our supreme court held that "section 103 of the Act, 40 P.S. § 1009.103, requires a 'child, parent, brother, [or] sister' of a deceased victim of an automobile accident to show dependency on the victim as a condition of eligibility for survivor's loss benefits." *Id.* at 294, 469 A.2d at 560. As *Chesler* was decided on December 30, 1983, almost one year prior to Keystone's payment of $5,000 in survivor's loss benefits, it is apparent that since Keystone had not received proof of dependency, the payment in question was not required by then-existing case law.

Nor can the subsequent crediting of the $5,000 in survivor's loss benefits to Keystone's undisputed obligation to pay $15,000 in work loss benefits be considered an impermissible "setoff." Although the No-fault Act does not define the term,

we note, as did the trial court, that the term has been defined in case law as a "counter-claim demand which defendant holds against plaintiff, arising out of a transaction extrinsic of plaintiff's cause of action". *M.N.C. Corporation v. Mount Lebanon Medical Center, Inc.*, 510 Pa. 490, 495, 509 A.2d 1256, 1259 (1986), [*quoting Black's Law* Dictionary 1230 (rev. 5th ed. 1979) ]. Keystone's treatment of the initial payment of $5,000 does not qualify as a "setoff" as so defined. *See also D.P. "Herk" Zimmerman, Jr., Inc. v. Workmen's Compensation Appeal Board (Himes)*, 103 Pa.Cmwlth. 68, 519 A.2d 1077 (1987) (§106 of No-fault Act provides that obligator/insurer is entitled to reimbursement from claimant who receives payments to which he or she was not entitled).

To allow the Gilbert estate to retain the sum of $5,000 erroneously paid as survivor's loss benefits, as well as the initial $10,000 in work loss benefits, and to receive in addition another $5,000 in work loss benefits, would be to award the estate a windfall of $5,000 to which it is not entitled. Accordingly, we agree with the trial court that the Gilbert estate has already received the full amount of work loss benefits owed to it.[13]

Appellants also contend that an additional issue concerns interest allegedly owed to the Gilbert estate. They argue as follows: As this court held in *Antanovich v. Allstate Insurance Company*, 320 Pa.Super. 322, 467 A.2d 345 (1983), *aff'd*, 507 Pa. 68, 488 A.2d 571 (1985), post-mortem work loss benefits, unlike those owed to a surviving victim, are to be paid in a lump sum. *Id.* at 341, 467 A.2d at 355. Pursuant to § 1009.106(a)(2) of the Act, 40 P.S. § 1009.106(a)(2), benefits are overdue if not paid within thirty days of the obligator's receipt of reasonable

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13. In light of our resolution of this issue we do not consider Keystone's assertion that the statute of limitations is an additional bar to the estate's claim.

proof of the fact and amount of loss, and overdue payments bear interest at a rate of eighteen percent per annum. Keystone was notified of Brian Gilbert's death shortly after it occurred but delayed five months in making the $10,000 payment. Accordingly, interest is owed to the estate as the result of Keystone's delay.

Assuming for the sake of argument that appellants are correct, the fact that the Gilbert estate was owed interest does not warrant Danny Gilbert's intervention as an additional representative plaintiff in the present action. In his petition to intervene, Gilbert averred that his claim "is identical to the claims of other class members, in that it seeks maximum basic work loss benefits, plus full interest and attorney's fees. ..." We have determined, however, that the Gilbert estate has already received the full amount of post-mortem work loss benefits to which it is entitled. Therefore, Gilbert's claim is not identical to that of other class members and he cannot serve as a representative plaintiff in the class action.

Accordingly, appellant's Petition to Intervene is properly denied.

D. Phil Sanchez

Phil Sanchez is the administrator of the estate of his mother, Barbara Sanchez, a pedestrian who was struck and killed by an automobile on May 20, 1984. Barbara Sanchez did not have automobile insurance. Keystone, the insurer of one of the vehicles involved in the accident, paid medical bills and funeral and survivor's loss benefits. Appellants assert that post-mortem work loss benefits are also owed. The trial court denied Sanchez's petition on the grounds that 1) it was barred by the doctrine of *lis pendens*, Sanchez as estate administrator having also filed an action for work loss benefits in the Court of Common Pleas of Philadelphia County, and 2) Barbara

Sanchez was not an insured within the meaning of the class action complaint. Appellants challenge both grounds of the trial court's ruling.

In a post-argument letter, Keystone informed this Court that Sanchez and Keystone have settled the action brought by Sanchez in the Philadelphia County Court of Common Pleas, the settlement having been approved by the court on February 15, 1990. Sanchez's counsel in the present appeal (who did not represent Sanchez in the Philadelphia action) do not dispute the existence of such a settlement, but they contend that they are nevertheless owed attorney's fees pursuant to § 1009.107 of the No-fault Act, 40 P.S. §1009.107. We find counsel's argument to be without merit. Accordingly, as there is no longer an actual case or controversy for this Court to decide, Sanchez's appeal is moot. *Richards v. Trimbur*, 374 Pa.Super. at 359, 548 A.2d at 119.

E. Conclusion

Having examined the merits of the petitions to intervene, we agree with the trial court that none are sufficient to establish a right of intervention under Pa.R.C.P. 2827. Therefore, the denial of the petitions by the trial court does not operate as a practical denial of relief obtainable in no other way. Thus, the orders are not appealable as to the petitioners/appellants. *See Frey's Estate, supra.*

IV.

Appeals taken by petitioners/appellants are quashed. Summary judgment is vacated and case remanded for proceedings consistent with this opinion.

ROWLEY, J., concurs in the result.

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA
CIVIL ACTION—LAW
CLASS ACTION
NO. 26 S 1987

MARY C. MILLER, Administratrix of the Estate of John R. Miller, Deceased, and all others similarly situated,

Plaintiffs

vs.

KEYSTONE INSURANCE COMPANY,

Defendant

## OPINION

Mary C. Miller, representative plaintiff and administratrix of the estate of her deceased son John R. Miller, brought this action on behalf of her son's estate and all others similarly situated against the defendant, Keystone Insurance Company (Keystone), to recover post-mortem work loss benefits pursuant to the now-repealed No-Fault Motor Vehicle Insurance Act (No-Fault Act), 40 P.S. § 1009.101, *et seq.* John Miller died as a result of a motor vehicle accident on August 12, 1980. The defendant paid to the estate $1,500 in funeral benefits and $5,652.97 in collision coverage benefits and to Mary Miller $5,000 in survivor's loss benefits. Work loss benefits were not paid. A complaint was filed in Cumberland County, on August 12, 1986, for post-mortem work loss benefits on behalf of the estate of John R. Miller and all others similarly situated. Following a change in venue and a long and involved procedural history, presently before us are defendant's Motion for Summary Judgment, plaintiffs' Motion for Class Certification,

and four (4) Petitions to Intervene Additional Representative Plaintiffs.[1] We first consider the Motion for Summary Judgment and then the Petitions to Intervene. Since we grant the former and deny the latter, it is unnecessary to address the Class Certification Motion in detail.

I.

In its Motion for Summary Judgment, Keystone argues that the Miller claim is barred by the statute of limitations. The No-Fault Act provides the following limitations periods for actions to recover benefits:

> (1) If no-fault benefits have not been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two years after the victim suffers the loss and either knows, or in the exercise of reasonable diligence should have known, that the loss was caused by the accident, or not later than four years after the accident, whichever is earlier. If no-fault benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant; may be commenced not later than two years after the last payment of benefits.

40 P.S. § 1009.106(c)(1).

The defendant admits that it paid Mary Miller $1,500 in funeral benefits on September 15, 1980, $5,652.97 in collision coverage benefits on October 1, 1980, and $5,000 in survivor's

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[1] A hearing was held, on October 25, 1988, on the Class Certification Motion, the Summary Judgment Motion, and the Petitions to Intervene. A fifth Petition to Intervene, that of George Lysien, was withdrawn at that time (N.T. 4). Even though these motions and petitions, all filed at different times, were heard together and are addressed here together, we emphasize that each is being considered separately, onits own merits.

loss benefits over a period of time ending on April 30, 1982 (*See,* Affidavit of Edward D'Imperio, attached to defendant's Motion, and copy of check attached to defendant's Reply Brief). It contends that since it last paid non-death no-fault benefits on October 1, 1980, namely the collision coverage, the statute of limitations period expired after two years, on October 1, 1982. Keystone further argues that even if the collision coverage benefits, constituting an Added Loss Benefit under the No-Fault Act, were found not to be a no-fault benefit, Mary Miller's claim would still be time-barred since it was not instituted within the four years after the accident period, August 12, 1984. The plaintiff counters that it is improper to consider a summary judgment motion prior to class certification, that collision coverage benefits do not constitute No-Fault benefits, that a factual dispute remains concerning the date of the last payment of benefits, and that defendant's failure to provide written notice of rejection of a claim has tolled the statute of limitations.

First, plaintiff's counsel is well aware that the Superior Court in *Jones v. Keystone,* 364 Pa. Super. 318, 528 A.2d 177 (1987) allocatur denied, 540 A.2d 535 (1988), did not hold that it was error to grant a motion for summary judgment prior to class certification. On the contrary, that Court affirmed the entry of summary judgment, albeit on different grounds. The *Jones* Court merely stated that it is error to grant summary judgment against the entire class prior to consideration of class certification, *Jones, supra.* ("Where, as here, summary judgment has been entered against the class plaintiff *before a motion for class certification has been filed,* Pa.R.C.P. 1715(a) specifically prohibits the entry of summary judgment against the proposed class ... . Because the question of class certification has not yet been adjudicated—no request therefor having been made—it was error for the trial court to dismiss the class

action complaint on a motion for summary judgment."). Since Keystone's motion presently before us pertains to Mary Miller's individual claim only, there are no procedural improprieties.

Second, despite plaintiff's contention that "Defendant's assertion that payment of a collision claim is payment of a No-Fault benefit appears dubious" and that "[a]lthough the Defendant argues that collision coverage is an added loss benefit, that clearly is not what the No-Fault Act says nor is that the way that it has repeatedly been interpreted" (Plaintiff's Brief In Opposition to Motion For Summary Judgment of Defendant Keystone Insurance Company, 5), plaintiff cites no authority in support of these bald allegations.[2] We are not required to resolve this dispute. If the defendant is correct and the collision coverage benefits are No-Fault benefits, the applicable two year statute of limitations expired on October 1, 1982. If the plaintiff is correct and the collision coverage benefits are not No-Fault benefits, no non-death No-Fault benefits were paid, and the applicable four year statute of

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[2] In its argument, Keystone points out that under the No-Fault Act definitions, " 'No-fault benefits' means basic loss benefits, added loss benefits, or both", and " 'Added loss benefits' means benefits provided by added loss insurance in accordance with section 207 of this act [Section 1009.207 of this title]." Section 207 of the No-Fault Act, it argues, includes collision coverage:

> (a) Mandatory offering.—Obligors providing security for the payment of basic loss benefits shall offer or obligate themselves to provide added loss benefits for injury or damage arising out of the ownership, maintenance, or use of a motor vehicle, including:
>
> . . .
>
> (5) for physical damage to a motor vehicle, a coverage for all collision and upset damage, subject to an optional deductible. ...

40 P.S. § 1009.207(a)(5).

Keystone thus concludes that the collision coverage benefits are non-death No-Fault benefits, triggering the two year statute of limitations.

limitations expired on August 12, 1984. In either case, the present action, filed on August 12, 1986, is time-barred.[3]

Third, plaintiff argues that there are remaining issues of fact in that D'Imperio's Affidavit, attached to the Motion for Summary Judgment, does not say that the collision coverage benefits was the last payment made and in fact says that survivor's benefits were paid at various times. The exhibits attached to the defendant's Reply Brief indicate that the last payment made to Mary Miller by Keystone was one for survivor's benefits, on April 30, 1982. Plaintiff seems to imply that this evidence is not conclusive, yet the plaintiff, who certainly should know whether she had received any additional subsequent payments, has failed to counter defendant's evidence with affidavits, receipts, or any other evidence depicting different facts. Thus, we accept the defendant's representation as to the payment dates.

Fourth, concerning plaintiff's argument that the statute of limitations had been tolled by Keystone's failure to provide Mary Miller with written notice of rejection, this argument has been rejected several times by our appellate courts, *see, Gabovitz v. State Auto Insurance Association,* 362 Pa. Super. 17, 523 A.2d 403, allocatur denied, 533 A.2d 92 (1987); *see also, Jones v. Keystone Insurance Co.,* 364 Pa. Super. 318, n.5, 528 A.2d 177, n.5 (1987). Since Mary Miller's claim is barred by the statute of limitations, under all the assorted methods of calculation proposed by counsel, we grant Keystone's Motion for Summary Judgment as to Mary Miller's individual claim

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[3] Keystone points out that it ignored its later payments of survivor's benefits to Mary Miller, ending on April 30, 1982, for these purposes since those payments were not "for loss arising otherwise than from death", 40 P.S. § 1009.106(c)(1). As it correctly notes, if the time period of "not later than two years after the last payment of benefits" includes these later survivor's benefits payments, plaintiff's claim is still time-barred since it was filed later than April 30, 1984.

only. We emphasize that summary judgment is being entered only as to Mary Miller's individual claim, not to the class action complaint.

II.

Plaintiffs move to intervene four petitioners as additional representative plaintiffs: Phil Sanchez, administrator of the estate of Barbara Sanchez; Deborah Steward, administratrix of the estate of Robert L. Steward, Jr.; Danny Gilbert, administrator of the estate of Brian W. Gilbert; and Suzanne Shadler, administratrix of the estate of Jeffrey A. Miller. Intervention in a class action may be permitted in accordance with Rules 2326 *et seq.*, Pa.R.C.P. 1713(3). These Rules provide:

> At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if
>
> (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
>
> (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or
>
> (3) such person could have joined as an original party in the action or could have been joined therein; or
>
> (4) the determination of such action may affect any legally enforceable interest of such person whether or not he may be bound by a judgment in the action.

Pa.R.C.P. 2327.

We address each petition seriatim and conclude, for the following reasons, that each must be denied.

*Sanchez Petition.*

Phil Sanchez has petitioned to intervene as an additional representative plaintiff as administrator of the estate of Barbara Sanchez, a pedestrian who was killed, on May 20, 1984, when she was struck by a car. Although neither Mrs. Sanchez nor a member of her household had automobile insurance, one of the vehicles involved in the accident was insured by Keystone. Keystone paid funeral benefits, medical bills, and survivor's loss benefits, and an individual action, which included a claim for work loss benefits, was filed in Philadelphia County on May 10, 1985.

The defendant contends that the Sanchez petition must be denied since it is barred by the doctrine of lis pendens and since the Sanchez estate is not a member of the class of insureds of Keystone, as defined in the class action complaint. For lis pendens, the defense of a prior pending action, there must be identity of the causes of action, the parties, the rights asserted, and the relief prayed for, 5 Standard Pennsylvania Practice 2d § 25:81. In the pending Philadelphia County action, Mr. Sanchez, as administrator of the estate of Barbara Sanchez, is a plaintiff, Keystone is a named defendant, and a claim is asserted for work loss benefits. Since the same parties and same claim are involved here as in the Philadelphia County action, Mr. Sanchez is precluded from proceeding in this action by the doctrine of lis pendens.[4] Even if the doctrine were not a bar, we are permitted to refuse the intervention

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[4] As the defendant correctly points out, our similar conclusion in *Freeze v. Donegal Mutual Insurance Co.*, No. 2185 S 1982 (C.P. Dauphin) (Opinion dated January 14, 1985), was approved of by the Superior Court, *Freeze v. Donegal Mutual Insurance Co.*, Nos. 78, 125 HBG 1985 (Pa. Super., May 19, 1986) (Memorandum) ("The trial court correctly determined that the instant action should not proceed while the same cause of action was undecided and pending in another county.").

since it is clear that petitioner's interests are already adequately represented, Pa.R.C.P. 2329.[5]

Furthermore, the No-Fault Act specifies, in its definitions section, who constitutes an "insured":

> (A) an individual identified by name as an insured in a contract of basic loss insurance complying with this act; and
>
> (B) a spouse or other relative of a named insured, a minor in the custody of a named insured, and a minor in the custody of a relative of a named insured if—
>
> (i) not identified by name as an insured in any other contract of basic restoration insurance complying with this act; and
>
> (ii) in residence in the same household with a named insured.
>
> An individual is in residence in the same household if he usually makes his home in the same family unit, even though he temporarily lives elsewhere.

40 P.S. §1009.103.

Even though Keystone was the applicable security in the Sanchez case, Barbara Sanchez was not an insured of Keystone, as defined in the act, and plaintiffs' complaint describes the class of plaintiffs as:

> ... all *insureds of defendant* who were covered by the Pennsylvania No-Fault Act with respect to their fatal injuries, whether same occurred inside or outside the

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[5] Although we are not considering class certification requirements at this time, we note that even if he were permitted to intervene, Mr. Sanchez would be unacceptable as a representative plaintiff for this class since the presence of the pending individual action could pose a conflict of interest for Mr. Sanchez, Pa.R.C.P. 1709.

> Commonwealth of Pennsylvania, since the effective date of the No-Fault Act who have not previously recovered full no-fault work loss benefits plus interest from 30 days after notice to defendants of the loss, and attorney's fees as appropriate, either through individual court-approved settlements or through class action settlements.

Plaintiffs' Complaint, paragraph 20 (emphasis added).

Plaintiffs now claim that what they really meant was "insured" in the broad, generic sense of the word and that we should not construe the term in a legal sense when interpreting the class description. We do not agree. Plaintiffs' counsel is well acquainted with the no-fault post-mortem work loss benefits class action processes. He has been involved in over 60 of these class actions (N.T. 86, October 25, 1988). This experience should have taught him not only how to properly draft a class description, but also that the courts will interpret these descriptions strictly rather than broadly, *see, Egenrieder v. Ohio Casualty Group,* 365 Pa. Super. 400, 529 A.2d 1118 (1987). Since the No-Fault Act, with which counsel is quite familiar, provides a definition for the term "insured", this definition is controlling, *see, Commonwealth v. Sitkin's Junk Co.*, 412 Pa. 132, 194 A.2d 199 (1963); 1 Pa.C.S.A. § 1903. Thus, due to the prior pending action, the fact that petitioner's interests are adequately represented, and the deceased's not falling within the class definition of "insureds", Mr. Sanchez's Petition to Intervene is denied.

*Steward Petition.*

Deborah Steward has petitioned to intervene as an additional representative plaintiff as administratrix of the estate of her husband, Robert L. Steward, Jr., who died on July 17, 1981 in a motor vehicle accident. Although it is unclear exactly what amounts were paid, both parties agree that funeral benefits,

survivor's loss benefits, and work loss benefits were paid and that the last payment was made December 3, 1982. We find it unnecessary to sort out how much was paid for what because even if full work loss benefits were not paid, Steward's claim is barred by the statute of limitations.

Although medical benefits were not paid, it is undisputed that some amount of work loss benefits were paid. It is also clear that work loss benefits arise otherwise than from death, *Sachritz v. Pennsylvania National Mutual Casualty Insurance Co.*, 500 Pa. 167, 455 A.2d 101 (1982). Thus, the Steward claim had to have been brought not later than two years after the last payment of benefits, 40 P.S. § 1009.106(c). Since the date of the last payment was December 3, 1982 and since the claim was not brought prior to December 3, 1984, Deborah Steward's claim is time-barred, and her Petition to Intervene as an Additional Representative Plaintiff must be denied.[6]

*Gilbert Petition.*

Danny Gilbert has petitioned to intervene as an additional representative plaintiff as administrator of the estate of his brother, Brian Gilbert, who died on November 23, 1984 in a motor vehicle accident. Keystone paid Gilbert's estate $5,000 in survivor's loss benefits on December 17, 1984 and $10,000 in work loss benefits on April 24, 1985. According to the exhibits submitted by Keystone, after issuing the first check, it realized that the payment had been premature and that the required proof of dependency had not been received. When such proof was not forthcoming, following correspondence with the estate's attorney, Keystone treated the $5,000 as part

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[6] Petitioner also argues that the survival of a minor daughter tolls the statute of limitations. As the defendant correctly points out, the daughter's minority tolls the statute as to *her* claim, but does not affect the estate's claim, the claim presently at issue.

of its admitted obligation to pay $15,000 in work loss benefits. Keystone paid the remaining $10,000 and claims that the dispute is over whether payment of $5,000 in survivor's loss benefits is required.

The Petitioner contends that the estate is entitled to an additional $5,000 since the No-Fault Act prohibits setoffs.[7] We do not think that Keystone's actions constitute a setoff.[8] Rather, Keystone was entitled to a reimbursement of the $5,000 which had been erroneously paid as survivor's benefits, to which the Gilbert estate was not entitled, *see, D. P. "Herk" Zimmerman, Jr., Inc. v. Workmen's Compensation Appeal Board,* 103 Pa. Commw. 68, 519 A.2d 1077 (1987). In the Gilbert claim, an attempt was made to establish dependency of the deceased mother, *see,* Exhibit E attached to defendant's Brief and Exhibits In Opposition to Petitions to Intervene. The $5,000 check in dispute was paid to the administrator of the estate, *see,* Exhibit B, *Id.*, not to the alleged dependent survivor. Clearly an error was made as the estate was not entitled to the money.

Keystone does not dispute that the estate was entitled to $15,000 in work loss benefits. Its $10,000 check, along with the $5,000 reimbursement it was due, satisfied this obligation. Thus, the Gilbert estate has received its entire share of work

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[7] The pertinent portion of the No-Fault Act reads:

(e) Deduction and setoff.—Except as otherwise provided in this act, basic loss benefits shall be paid without deduction or setoff.

40 P.S. § 1009.106(e).

[8] Our Supreme Court has stated that "[a] set-off is a 'counter-claim demand which defendant holds against plaintiff, arising out of a transaction *extrinsic* of plaintiff's cause of action.' BLACK'S LAW DICTIONARY 1230 (rev. 5th ed. 1979) (emphasis added)." *M.N.C. Corp. v. Mount Lebanon Medical Center, Inc.*, 510 Pa. 490, 495, 509 A.2d 1256, 1259 (1986).

loss benefits and Danny Gilbert's petition to intervene must be denied.[9]

*Shadler Petition.*

Suzanne Shadler has petitioned to intervene as an additional representative plaintiff as administratrix of the estate of Jeffrey A. Miller who died on September 11, 1981 in a motor vehicle accident. No no-fault benefits had been paid. At the time of the accident, Jeffrey Miller, then Ms. Shadler's boyfriend, was driving a car owned by Mr. Shadler's mother, with whom he did not reside, and insured by Keystone. Keystone contends that Shadler's petition should be denied since Jeffrey Miller was not a member of the class and since the claim is barred by the statute of limitations.

As with Barbara Sanchez, Jeffrey Miller was not an insured of Keystone, within the auspices of the No-Fault Act, and therefore, does not fall within the proposed class, described as "insureds of defendant", *see* discussion under Sanchez Petition, *supra* pp 8-11 [63a-65a]. Although Shadler's petition must be denied on this ground, we also find that her claim is time-barred.

The parties dispute what the appropriate statutory time period is in this case. The petitioner claims that, since no no-fault benefits were paid, the four year* from the date of the accident period applies, having the statute run until September 11, 1985. Petitioner further contends that the statutory period was tolled by the pendency of another class action, *Jones v. Keystone Insurance Co.*, in which the complaint was

[9] Defendant is correct in pointing out that the case relied upon by petitioner, *Cramer v. Allstate Insurance Co.*, 33 D & C 3d 339 (1985), is one in which the insurance company attempted to deduct moneys which the survivors were entitled to under the law at the time of payment. Here, by contrast, the estate of Brian Gilbert was never entitled to the money.

filed on June 24, 1985.[10] The defendant, on the other hand, argues that, pursuant to *Kamperis v. Nationwide Insurance Co.*, 503 Pa. 536, 469 A.2d 1382 (1983), the period expires two years after Jeffrey Miller would have accrued the $15,000 amount of work loss, December 1982, and thus the period expired December 1984 and is time-barred. The claim is barred even under petitioner's calculations, the later of the two dates.

In *Cunningham v. Insurance Company of North America*, 515 Pa. 486, 530 A.2d 407 (1987), *cert. denied*, 108 S.Ct. 704 (1988), the Supreme Court ruled that a prior class action does not toll where it is apparent from the face of the complaint that the representative plaintiff lacked standing. The Court emphasized that the holding applied where it "was plainly discernible on the face of the pleadings ... that standing was absent." *Cunningham*, 515 Pa. at 495-496, 530 A.2d at 411.

We find that the filing of the *Jones* complaint did not toll the statute of limitations. The *Jones* complaint defines the proposed class as:

> ... all insureds of defendant who were covered by the Pennsylvania No-Fault Motor Vehicle Insurance Act with respect to their fatal injuries, whether same occurred inside of [sic] outside the Commonwealth of Pennsylvania, since the time of the passage of the No-Fault Act.

*Jones* Complaint, paragraph 18.

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[10] *Jones v. Keystone Insurance Co.* (No. 695 S 1986, Dauphin County) was originally filed in York County and later transferred here. We granted defendant's Motion for Summary Judgment which the Superior Court later affirmed as to the representative plaintiff, but remanded the class action complaint, 364 Pa. Super. 318, 528 A.2d 177 (1987), allocatur denied, 540 A.2d 535 (1988). Since there was no representative plaintiff, we could not consider plaintiffs' Motion for Class Certification and dismissed the *Jones* action on October 25, 1988.

What is also averred in the *Jones* complaint is that:

> 5. At the time of his death, decedent was not entitled to basic loss benefits under any policy of no-fault automobile insurance.
>
> 6. On November 21, 1977, a claim for basis* loss benefits, including work loss, was filed under the Assigned Claims Plan and defendant was named as the servicing company under Policy No. ACP 88-701-113.

*Jones* Complaint, paragraphs 5, 6.

Thus, what is clear from the face of the complaint is that Jones lacked standing to represent a class of insureds of Keystone, since her decedent was not an "insured", as defined in the No-Fault Act. Keystone was obligated through the Assigned Claims Plan, for which the No-Fault Act provides separate rules, *see,* 40 P.S. § 1009.108. Since Jones' lack of standing in this respect is plainly discernible from the face of the complaint, the *Jones* action did not toll the statute of limitations, *Cunningham, supra.* Thus, petitioner's claim, even under the four year* from the date of the accident calculation, is time-barred, and her petition to intervene as an additional representative plaintiff must be denied.[11]

III.

Lastly, we consider plaintiffs' Motion for Class Certification. The requirements for class certification are set forth in Pa.R.C.P. 1702, 1708, and 1709. A class may be certified if:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;

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[11] Petitioner also argues that the survival of a minor son tolls the statute of limitations. As we have already pointed out, *see, supra* n.6, the minority does not affect the estate's claim, the claim at issue here.

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and

(5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Pa.R.C.P. 1702.

Mary Miller's individual claim has been dismissed, and none of the Petitioners to Intervene as Additional Representative Plaintiffs' claims has been found to have merit. Thus, there is no representative plaintiff to lead this purported class action. Without a representative plaintiff, the prerequisites to class action certification cannot be met; therefore, plaintiffs' Motion for Class Certification must be denied.[12]

IV.

We have found that the claim of the representative plaintiff, Mary Miller, is barred by the statute of limitations and thereby grant defendant's Motion for Summary Judgment as to Miller's individual claim only. Further, after full analysis, we have concluded that none of the petitioners who have come forward to intervene as additional representative plaintiffs has a meritorious claim; thus, we have denied all of these petitions. Having granted the summary judgment and denied the petitions, we find that there is no representative plaintiff available to lead this class; hence, the requirements for class certification cannot be met and plaintiffs' motion must be denied.

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[12] We emphasize that we are unable to certify this class due to the lack of a representative plaintiff; our decision in no way terminates the rights of any potential unnamed class members.

For the foregoing reasons, we enter the following

ORDERS

AND NOW, May 16, 1989, defendant's Motion for Summary Judgment is granted as to Mary Miller's individual claim only.

AND NOW, May 16, 1989, the petition of Phil Sanchez, administrator of the estate of Barbara Sanchez, to Intervene as an Additional Representative Plaintiff is denied.

AND NOW, May 16, 1989, the petition of Deborah Steward, administratrix of the estate of Robert L. Steward, Jr., to Intervene as an Additional Representative Plaintiff is denied.

AND NOW, May 16, 1989, the petition of Danny Gilbert, administrator of the estate of Brian Gilbert, to Intervene as an Additional Representative Plaintiff is denied.

AND NOW, May 16, 1989, the petition of Suzanne Shadler, administratrix of the estate of Jeffrey A. Miller, to Intervene as an Additional Representative Plaintiff is denied.

AND NOW, May 16, 1989, plaintiffs' Motion for Class Certification is denied.

/s/Warren G. Morgan, Judge

Distribution:

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A. Richard Feldman, Esquire, 16th Floor, 3 Mellon Bank Center, Philadelphia, PA 19102

**Dorothea DERCOLI, Appellant,**

**v.**

**PENNSYLVANIA NATIONAL MUTUAL INSURANCE COMPANY and Grange Mutual Casualty Company, Appellees.**

Supreme Court of Pennsylvania.

Argued Sept. 29, 1988.

Decided March 3, 1989.

Insured brought civil action against insurers, alleging that they had violated duty of good faith by failing to advise her of decision abolishing interspousal immunity. The Court of Common Pleas, Lawrence County, No. 67 of 1986 C.A., Glen McCracken, Jr., J., dismissed complaint, and insured appealed. The Superior Court, No. 00378 Pittsburgh 1987, affirmed, 369 Pa.Super. 289, 535 A.2d 163, and insured appealed. The Supreme Court, No. 40 W.D. Appeal Docket 1988, Larsen, J., held that: (1) automobile insurers breached duty of good faith and fair dealing to inform her of decision and her apparent right to benefit under liability provisions of policies as result of that decision, and (2) abolition of defense of interspousal immunity applied retroactively to insured.

Reversed and remanded.

Papadakos, J, filed concurring opinion in which McDermott, J., joined.

Flaherty, J., filed dissenting opinion in which Zappala, J., joined.

Nix, C.J., dissented.

**1. Insurance 602.2(3)**

Automobile insurers breached duty of good faith and fair dealing to insured whose husband was killed in automobile accident by failing to inform her of decision eliminating interspousal immunity defense and her apparent right to benefit under liability provisions of her policies as result of that decision; insured was informed by insurers' agents that they would see to it that she received all benefits to which she was entitled, and that she would not need an attorney, yet was not informed of her apparent right to damages against her deceased husband's estate.

**2. Insurance 156(1)**

Duty of insurance company to deal with insured fairly and in good faith includes duty of full and complete disclosure as to all benefits of every coverage that is provided by applicable policies or policies• along with all requirements, including any time limitations for making claim.

**3. Insurance 156(1)**

Where insurer undertakes to advise and counsel insured in insured's claim for benefits, insurer has duty to inform insured of all benefits and coverage that may be available and of any potential adverse interests pertaining to insurer's liability under applicable policy.

**4. Courts 100(1)**

Abolition of defense of interspousal immunity as promulgated in *Hack* applied retroactively to insured whose claim arose out of accident that occurred approximately one year prior to *Hack* decision.

---

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Dan P. Wimer, Mansell & Jamison, New Castle, for Pennsylvania Nat. Mut. Ins. Co.

Peter E. Horne, Balph, Nicolls, Mitsos, Flannery & Motto, New Castle, for Grange Mut. Cas. Co.

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, ZAPPALA, PAPADAKOS and STOUT, JJ.

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

LARSEN, Justice.

Appellant Dorothea Dercoli appeals from an order of the Superior Court affirming an order of the Lawrence County Common Pleas Court which sustained a demurrer to her complaint and dismissed her lawsuit against appellees Pennsylvania National Mutual Insurance Company (Penn National) and Grange Mutual Casualty Company (Grange) for breach of fair dealing and good faith. In her appeal the appellant frames two issues: (1) whether our decision in *Hack v. Hack*, 495 Pa. 300, 433 A.2d 859 (1981), abolishing the defense of interspousal immunity is to be given retroactive application; and (2) whether the duty of fair dealing and good faith requires an automobile insurer to properly advise its insured of the insured's entitlement to present a claim or claims under the applicable policy where the insurer advises its insured that legal representation is unnecessary and induces the insured to rely upon the insurer to pay appropriate benefits?

The issues presented by the appellant arise out of the following factual background: On the morning of July 21, 1980, the appellant was riding as a passenger in an automobile being operated by her husband, David R. Dercoli. The automobile was travelling on U.S. Route 422 in Lawrence County when, apparently, Mr. Dercoli became drowsy and fell asleep.

With Mr. Dercoli asleep at the wheel, the automobile crossed over the centerline of the highway and crashed into the rear wheels of an on-coming tractor-trailer. Mr. Dercoli was killed instantly. The appellant was severely injured.

At the time of the tragic accident Mr. Dercoli was insured under two automobile insurance policies. One of the policies was with appellee Penn National and the other was with appellee Grange. Both insurers were notified of the accident and the injuries and losses resulting therefrom. In the claim process that followed, the appellant relied upon the advice of the appellees' agents to receive the benefits due her under the applicable policies. Subsequently, after receiving the advice of the appellees' agents, the appellant began to receive certain benefits paid by the appellees under the policies in force. Appellant continued to receive the benefit checks until approximately, April, 1984.

On July 14, 1981, approximately one year after the accident and while appellant was receiving benefit checks and relying upon appellees' agents for advice, this Court decided the case of *Hack v. Hack, supra.** In *Hack* we abolished the defense of interspousal immunity as a bar to an action for personal injuries caused by the negligence of the injured victim's spouse. The appellant did not learn of the removal of this bar to suit until sometime after March of 1985.

In January, 1986, appellant filed a complaint in civil action against the appellees averring, *inter alia,* a breach of appellees' duty of fair dealing and good faith. Specifically, the appellant sets forth, as relevant allegations in her complaint, the following:

> 16. [U]pon notice of said motor vehicle accident by or on behalf of Plaintiff, Defendants PENN NATIONAL and GRANGE, through their authorized Agents, coop-

eratively and equally undertook the handling, processing and payment of Plaintiff's benefits under said Contracts.

17. At all times herein material, Plaintiff was not represented by legal Counsel, and Defendants' Agents represented to and assured Plaintiff that her claim would be processed without the need for Plaintiff to be independently represented.

18. Plaintiff reasonably relied entirely upon the advice of Defendants' agents as to the nature and extent of benefits which were due to her under said insurance contracts. Further, Defendant's agents were fully cognizant of Plaintiff's said reasonable reliance and lack of independent representation.

19. At all times material herein, and by reason of said insurance Contracts, Defendants PENN NATIONAL and GRANGE were each charged with a duty of good faith and fair dealing in respect of determination of entitlement, processing, and payment of Plaintiff's benefits under said Contracts. This duty included, among other things, the obligation on the part of said Defendants to pay or advise Plaintiff as to any and all benefits to which Plaintiff reasonably appeared to be entitled under said insurance contracts.

20. By reason of the nature of said insurance Contracts, Defendants PENN NATIONAL and GRANGE occupied the position of a fiduciary with respect to determination of entitlement and payment of Plaintiff's benefits thereunder.

25. Upon the decision of *Hack vs Hack*, Supra, Defendants were thereby placed in a position of conflicting interests, in that presentation or consideration of any claim by or on behalf of Plaintiff and based upon the

negligence liability of her said husband would have created a substantial additional risk of loss or liability to each Defendant.

26. Under the circumstances referred to above, and by reason of their said duty of good faith and fair dealing and their fiduciary relationship which they occupied with respect to Plaintiff, Defendants were each obligated to advise Plaintiff of her apparent right to benefits for liability coverage under said insurance Contract, in order that Plaintiff would have realized the maximum amount of benefits to which she reasonably appeared to be entitled.

27. Defendants PENN NATIONAL and GRANGE, and each of them, have breached the said insurance Contracts and the corresponding fiduciary duties and duties of good faith and fair dealing in that said Defendant had failed to advise Plaintiff as to her apparent entitlement to claim for benefits under the liability coverage of said insurance Contracts, of Defendants' conflict of interests in advising or continuing to advise Plaintiff regarding her entitlement to benefits or of her possible need for independent legal counsel, and Defendants further failed to pay or offer to pay to Plaintiff any benefits under the liability coverage of said Contracts.

In response to appellant's complaint the appellees filed preliminary objections in the nature of a demurrer. After argument on appellees' demurrer, the lower court concluded that the appellee-insurers had no duty to inform appellant of the *Hack* decision and the effect, if any, that decision had on appellee's ability to obtain benefits under the liability provisions of the applicable policies. In reaching this conclusion the lower court cited the case of *Taglianetti v. Workmen's Compensation Appeal Board*, 503 Pa. 270, 469 A.2d 548 (1983)

involving a workmen's compensation claimant. The lower court analogized the situation in the instant case to that involved in *Taglianetti*. It was decided that the reasoning applied in *Taglianetti* which held that the insured-employer had no duty to advise a compensation claimant of the maximum possible benefits was applicable to this case. Accordingly, the demurrer was sustained and appellant's complaint was dismissed. On appeal, the Superior Court affirmed. 369 Pa.Super. 289, 535 A.2d 163.

Since this is an appeal from the sustaining of a demurrer, we accept as true all well-pleaded material facts set forth in the complaint as well as all inferences reasonably deducible therefrom. *Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744 (1983), *Allstate Insurance Co. v. Fioravanti*, 451 Pa. 108, 299 A.2d 585 (1973). In her complaint the appellant avers that upon the advice and assurances of appellees' agents, she was induced to refrain from hiring an attorney to represent her in her dealings with the appellees. She alleges that she placed her entire trust and confidence in appellees' agents and relied upon their advice as to the extent of the benefits available to her under the applicable insurance policies.

[1] The appellant argues that as the spouse of David R. Dercoli and as a resident of the same household with him, she is "named insured" under the terms of the relevant insurance policies. She argues that by virtue of the relationship that exist between her and the appellee-insurers, the appellees were charged with a duty of fair dealing and good faith with respect to the determination of the benefits that appellant may reasonably be entitled to claim. Thus, appellant argues that when *Hack v. Hack, supra.*[•] was decided, the appellees had a duty to inform her of the decision and of her apparent right to benefits under the liability provisions of the applicable policies as a result of that decision.

In spite of the fact that appellant was assured by appellees' agents that they would see to it that appellant received all benefits to which she was entitled, appellees' agents failed to advise her of her right to seek liability damages. The appellant argues that this failure was a breach of appellees' duty of fair dealing and good faith. In addition, appellant argues that when *Hack* abolished the bar of interspousal immunity, a conflict of interest arose with the appellees' agents who were advising the appellant. On the one hand these agents were aware of appellant's injuries and expenses and of her reliance on them for advice and guidance in her claims. On the other hand they knew that if they would advise appellant of the *Hack* decision and of her right to proceed against her husband's estate for damages, such proceedings would substantially increase the financial exposure of the appellee-insurers. Nonetheless, the appellees' agents continued to deal with the appellant on the same basis and continued to permit her to rely on them for all that she was entitled to under the policies. Considering all of the well-pleaded material facts in appellant's complaint and the reasonably deducible inferences therefrom, we believe that the appellant's arguments have merit.

**[2, 3]** We have long recognized that: "the utmost fair dealing should characterize the transactions between an insurance company and the insured." *Fedas v. Insurance Company of the State of Pennsylvania,* 300 Pa. 555, 151 A. 285 (1930). The appellees' agents in this case voluntarily undertook to provide assistance and advice to appellant and in the process advised her against retaining independent legal counsel. The appellees were bound to deal with the appellant on a fair and frank basis, and at all times, to act in good faith. The duty of an insurance company to deal with the insured fairly and in good faith includes the duty of full and complete disclosure as

to all of the benefits and every coverage that is provided by the applicable policy or policies along with all requirements, including any time limitations for making a claim. *See: Gatlin v. Tennessee Farmers Mutual Insurance Co.*, 741 S.W. 2d 324 (Tenn. 1987). *See also: Sarchett v. Blue Shield of California*, 43 Cal.3d 1, 233 Cal.Rptr. 76, 729 P.2d 267 (1987). This is especially true where the insurer undertakes to advise and counsel the insured in the insured's claim for benefits. Under such circumstances, the insurer has a duty to inform the insured of all benefits and coverage that may be available and of any potential adverse interest pertaining to the insurer's liability under the applicable policy. When *Hack* was decided and the defense of interspousal immunity was abolished, an adverse interest pertaining to appellees' financial exposure arose. Consistent with the obligation of fair dealing and good faith the appellees had a duty to inform the appellant of their conflict of interest, and of her apparent right to damages against her deceased husband's estate which ultimately would be payable under the liability provisions of the policies that insured the decedent. The appellees' failure to so inform the appellant was a breach of the duty of fair dealing and good faith. Assuring the appellant at the outset that she need not hire an independent attorney and that she would receive all that she was entitled to receive, and then failing to inform her of her apparent right to damages following the *Hack* decision is hardly dealing with appellant fairly and in good faith.

The appellees, relying on the decision in *Taglianetti v. Workmen's Compensation Appeal Board*, 503 Pa. 270, 469 A.2d 548 (1983), argue that they had no affirmative duty to advise the appellant of the *Hack* decision and her ostensible right to file a claim for damages on which appellees would ultimately be liable. *Taglianetti* involved a claim for survivor's benefits under the Workmen's Compensation Act, Act of June

2, 1915, P.L. 736, as amended. The claimant's husband had died of a fatal heart attack while in the course of his employment. The claimant requested information of her husband's employer as to any widow's benefits due her. She was not advised as to all possible benefits that she may claim. When she eventually learned of an additional claim available to her, the time limitation for that claim had expired. This Court held that the employer had no affirmative duty to apprise the claimant of all available benefits. (Larsen J. filed a dissenting opinion which was joined by Roberts, J.). We believe that *Taglianetti* was wrongly decided in that the decision in that case tends to relieve insurers and similar entities of the obligation to deal fairly, honestly, openly and in good faith with lay-claimants and non-experts who may be entitled to benefits and who are the very people the insurers have obligated themselves to protect.

[4] The remaining issue raised in this case is whether *Hack v. Hack, supra* is to be applied retroactively to appellant's claim for damages. That is to say, did the abolition of the defense of interspousal immunity as promulgated in *Hack* apply to appellant whose claim arose out of an accident that occurred approximately one year prior to the *Hack* decision? Neither the trial court nor the Superior Court addressed this question in that each court found no duty to inform on the part of the appellees. Since, however, we have concluded that the appellees breached their duty of fair dealing and good faith in failing to inform the appellant of her apparent right to seek damages after the *Hack* decision, we are constrained to consider this issue. If *Hack* does not apply to appellant's claim, that decision would be of no benefit to her. It would follow then that the appellees' failure to inform appellant of *Hack* would not constitute a breach of their obligations toward her. If, however, *Hack* applies to appellant's claim, then the failure

on the part of the appellees to inform appellant of that decision would amount to a breach of fair dealing and good faith in that she was denied a claim to which she was entitled.

In *August v. Stasak*, 492 Pa. 550, 424 A.2d 1328 (1981), we said: "retroactive application is a matter of judicial discretion which must be exercised on a case by case basis." We cited with approval the test proposed by Justice Roger Traynor of the California Supreme Court for deciding whether an overruling decision, (such as *Hack v. Hack, supra)*, will have retroactive effect. The test involves a balancing of the relative hardships that would be imposed upon the respective parties.

> A judge is mindful of the traditional antipathy toward retroactive law that springs from its recurring association with injustice and reckons with the possibility that a retroactive overruling could entail substantial hardship. He may nevertheless be impelled to make such an overruling if the hardships it would impose upon those who have relied upon the precedent appear not so great as the hardships that would inure to those who would remain saddled with a bad precedent under a prospective overruling only ... [T]he outworn precedent may be so badly worn that whatever reliance it engendered would hardly be worthy of protection. Traynor, R., *La Rude Vita, La Dole Giustizia; Or Hard Cases Can Make Good Law*, 29 U.Chi.L.Rev. 223, 231-32 (1962).

Balancing the hardships in this case would require that *Hack* be applied retrospectively to the appellant's claim. The *Hack* decision eliminated the defense of interspousal immunity which acted as a bar to suit when one was injured at the hands of a negligent spouse. At the time of the *Hack* decision appellant's claim was well within the applicable statute of limitations. Thus, with the bar removed and the claim being viable

and within the time limitations, it would be unfair to continue the bar as to the appellant. Further, there is no equity favoring the appellees' position that would dictate the opposite conclusion.

The order of the Superior Court is reversed and this case is remanded to the Court of Common Pleas of Lawrence County for proceedings consistent with this opinion.

PAPADAKOS, J., files a concurring opinion in which McDERMOTT, J., joins.

FLAHERTY, J., files a dissenting opinion in which ZAPPALA, J., joins.

NIX, C.J., dissents.

PAPADAKOS, Justice, concurring.

While I concur in the judgment of the Court and generally agree with the reasoning set forth in the majority opinion, I write separately for two reasons. First, I wish to disassociate myself from the pronouncement made in that opinion to the effect that *Taglianetti v. Workmen's Compensation Appeal Board,* 503 Pa. 270, 469 A.2d 548 (1983), was wrongly decided. Our decision today requires no such declaration.

Second, I must expressly take issue with Mr. Justice Flaherty's dissent.

I.

In the instant case, insurers breached a voluntarily assumed fiduciary duty to provide Appellant with all available benefits, which duty necessarily involves taking action in accordance with changes in the law. In *Taglianetti, supra,* we agreed with the contention that an employer was under no legally imposed affirmative duty to provide information of possible worker's compensation benefits to a deceased employee's spouse where there was no evidence of fraud, inten-

tional deception, or the making of misleading statements. This case involves a duty voluntarily assumed by an insurer; *Taglianetti* presented a stituation* where we held that by law no duty to inform exists or may be imposed on an employer. Both legally and factually, the two cases are distinct. If *Taglianetti*, so recently decided, is unsound, this is neither the time nor the place to say so. Subject to the above qualification, I agree with the majority opinion.

II.

As to Mr. Justice Flaherty's dissent, I find it unfortunate that he complicates a simple proposition of law into an earth-shaking dilemma that would serve as an excuse to deny justice and fair play to a bereaved, defenseless, unsuspecting and trusting widow. Mr. Justice Flaherty's dissent, if it became law, would snatch from a poor widow the benefits she was entitled to receive but for the knowing and intentional misguidance of the insurers that induced her to place her entire trust and confidence in the insurers to see to it that she received all of the benefits to which she was entitled. Once the insurers knowingly and purposefully talked the widow out of seeking independent legal counsel, the insurers voluntarily placed themselves in the position of protecting the widow and obtaining for her all benefits that were reasonably due under the facts and state of law known to the insurers.

Our majority opinion does not transform insurance companies into legal service advisors for claimants, as feared by the dissent. On the contrary, in this case, the insurers themselves voluntarily transformed themselves into legal advisors to the widow. This accommodation offered by the insurer would certainly inure to the monetary benefit of ***both*** parties. Unless the dissenting opinion is suggesting that legal representation *per se* harms the interests of widows, orphans and

others similarly situated, I believe that the approach outlined in the majority opinion will benefit everyone. After all, the law does not favor a volunteer. It is simple black letter law that where one gratuitously undertakes to render legal or other services and then does so in a careless or negligent way, causing harm, liability attaches. *Pascarella v. Kelley,* 378 Pa. 18, 105 A.2d 70 (1954).

Had privately retained counsel committed the same omission committed by the insurers here (not recognizing and acting upon the decision in *Hack v. Hack,* 495 Pa. 300, 433 A.2d 859 (1981)), thus causing the client a loss of liability benefits, such counsel would have been subject to a malpractice suit. See, Pa.R.P.C. 1.1 (Competence), 1.3 (Diligence), and 1.4 (Communication). See also, *Lichow v. Sowers,* 334 Pa. 353, 6 A.2d 285 (1939). Why should we hold the insurers, under these circumstances, to any lesser degree of responsibility?

McDERMOTT, J., joins this Concurring Opinion.

FLAHERTY, Justice, dissenting.

I dissent. Until today an insurance company on the facts pleaded in this case has had no *fiduciary* duty to an insured, even when it advised its insured that he does not need a lawyer. But if, under the guise of "fair dealing and good faith," we are now to decide that insurance companies have a fiduciary duty to advise of every possible claim, surely insurance companies will cease even to talk to claimants for fear of breaching this new judicially declared duty. However, with such a duty, if they do continue to talk to claimants, what will their obligations be? Are they obligated to advise of innovative claims against themselves? Are they obligated to inform claimants of an improbable but perhaps conceivable claim that they themselves would not agree to pay? Are they, as in this case, obligated to

be on the lookout for changes in the law which might be favorable to a claimant? Until today, insurance companies have had none of these obligations.

As much as we all would like to see unfortunate victims of automobile accidents compensated fully, such compensation cannot be achieved at the cost of dismantling the insurance industry. It has always been the case that insurance companies, insureds and claimants are potential adversaries. An insured knows or should know this upon entering into an insurance contract, and a *contract* is what it is. When a loss occurs, it has always been the prerogative of an insurance company to make offers of settlement, and it has always been the prerogative of the insured to accept or reject them. Whether to accept or reject the offer, however, is a decision that only the claimant can make. If for some reason, the offer does not satisfy him, he is perfectly free to seek independent legal counsel, notwithstanding advice to the contrary by the insurance company. To change this traditional underlying arrangement, to transform insurance companies into legal advisors for claimants, is unprecedented. In sum, I cannot believe that the approach outlined in the majority opinion will benefit anyone, and in the long run it will certainly harm the interests of those it seeks to protect.

ZAPPALA, J., joins in this Dissenting Opinion.

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*Errata in original.

Supreme Court, U.S.
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(2)

No. 94-188

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MARY C. MILLER, Administratrix of the Estate of JOHN R. MILLER, Deceased, and all others similarly situated,

*Petitioners,*

*v.*

KEYSTONE INSURANCE COMPANY,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioner failed to raise any federal question in the state court proceedings below?

2. Whether this Court lacks jurisdiction to review a decision of a state court on a matter of state law where the only federal question alleged is that the decision overruled a prior state court precedent in violation of the doctrine of *stare decisis*?

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No. 94-188

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MARY C. MILLER, Administratrix of the Estate of JOHN R. MILLER, Deceased, and all others similarly situated,

*Petitioners,*

*v.*

KEYSTONE INSURANCE COMPANY,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

## BRIEF IN OPPOSITION

## OPINION BELOW

The decision of the Pennsylvania Supreme Court in this case is reported at 535 Pa. 531, 636 A.2d 1109 (1994).

## STATEMENT OF JURISDICTION

This Court does not have jurisdiction over this case pursuant to 28 U.S.C. §1257(a), or any other statute or rule. The reasons why this is so are set forth, *infra.*

## STATEMENT OF THE CASE

This is an action, styled as a class action, for insurance benefits under the Pennsylvania No-Fault Motor Vehicle Insurance Act, 40 P.S. §1009.101, *et seq.* (repealed, Act of February 12, 1984, P.L. 26, No. 11, §8(a) ("No-Fault Act").)

Petitioner Mary C. Miller brought suit in state court on August 11, 1986 in her capacity as the administratrix of the estate of John R. Miller. John Miller, an insured of respondent Keystone Insurance Company ("Keystone")[1], had died in an automobile accident six years before, on August 12, 1980.

Following the accident in 1980, Keystone had promptly paid a variety of insurance benefits pursuant to John R. Miller's insurance policy. Keystone paid $1,500 in funeral benefits on September 15, 1980, $5,652.97 in collision coverage benefits on October 1, 1980, and $5,000 in survivor's loss benefits over a period of time ending on April 30, 1982. Petitioner did not request Keystone to pay work loss benefits[2] to the estate and Keystone did not pay

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[1] Keystone is a wholly owned subsidiary of AAA Mid-Atlantic Inc. and has two subsidiaries: Keystone Insurance Company of New Jersey, and Keystone State Life Insurance Company.

[2] The No-Fault Act provided for work loss benefits in an amount not to exceed $15,000, to be paid to an accident victim for lost income resulting from the accident. 40 P.S. §1009.-202(b). Work loss benefits were determined to be payable for income loss arising after death. *Allstate Insurance Co. v. Heff-*

[footnote continued]

any such benefits. (A. 5a.)[3]

In the trial court, Keystone moved for summary judgment based on the statute of limitations. Under the No-Fault Act, an action for work loss benefits was untimely unless filed within four years of the accident or within two years from the last payment of benefits. 40 P.S. §1009.106(c)(1).

In opposition to Keystone' summary judgment motion, petitioner did not present any testimonial evidence, in the form of affidavit or otherwise. The sole evidence submitted by petitioner in opposition to the motion consisted of two documents from Keystone's files. One was a chart listing the various payments made on the claim. (R.A. 3a.)[4] The other was a letter from an independent claims adjuster to a Keystone claims representative. (R.A. 1a.) (*See* A. 5a-6a.)

The trial court granted summary judgment in favor of Keystone and against petitioner based on the statute of limitations. (A. 57a.)

On appeal to the Superior Court of Pennsylvania, an intermediate appellate court, petitioner contended (for the first time) that the statute of limitations had been tolled because Keystone had breached an alleged duty of good faith and fair dealing that it owed to her. The alleged breach consisted of Keystone's failure to advise petitioner that she had a potential cause of action against

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*ner*, 491 Pa. 447, 421 A.2d 629 (1980). This kind of post-death work loss benefit has been termed "post-mortem work loss benefits."

[3]The Appendix appended to the Petition for Writ of Certiorari will be cited as "A."

[4]Respondent's Appendix is appended hereto and will be cited as "R.A."

Keystone for post-mortem work loss benefits. At the time that Keystone was interacting with petitioner, no Pennsylvania appellate court had yet recognized a right of estates of deceased victims to post-mortem work loss benefits. Such a right was eventually established in Pennsylvania on December 30, 1983, when the Pennsylvania Supreme Court decided *Freeze v. Donegal Mutual Insurance Company*, 504 Pa. 218, 470 A.2d 958 (1983). (*See* A. 13a n.10.)

The Superior Court reversed the summary judgment in favor of Keystone and remanded for further proceedings. (A. 20a.) The Superior Court ruled that an insurer under the No-Fault Act had a duty to advise an unrepresented insured of potential claims that the insured might bring against the insurer. The Superior Court further implied that a failure to so advise an insured would toll the statute of limitations. This was a novel ruling in Pennsylvania law, which the Superior Court based on the prior Supreme Court of Pennsylvania decision in *Dercoli v. Pennsylvania National Mutual Insurance Co.*, 520 Pa. 471, 554 A.2d 906 (1989).

On appeal to the Pennsylvania Supreme Court, the Superior Court's decision was reversed and the summary judgment in favor of Keystone was reinstated. The Supreme Court held that petitioner's claim was barred by the No-Fault Act's statute of limitations. In the Supreme Court's words, the Superior Court had "misinterpreted this Court's holding in *Dercoli* and applied it to a situation which is factually distinguishable." (A. 4a.)



## SUMMARY OF ARGUMENT

Petitioner failed to raise any federal questions in the state court proceedings, and on this basis alone, the petition should be denied.

Petitioner has failed to identify a federal question in her petition and this Court accordingly lacks jurisdiction over this case. The issue identified by petitioner – whether the Pennsylvania Supreme Court's decision below overruled one of its prior decisions without due regard for *stare decisis* – does not raise an issue of federal law. *Stare decisis* is not a constitutional doctrine, and numerous cases of this Court hold that no jurisdiction exists to review state court decisions on the ground that they overrule prior state court precedent.

In any event, the Pennsylvania Supreme Court did not overrule any precedents. On the contrary, the Court was careful to distinguish the case relied upon by petitioner, and to show the consistency of its decision with various other prior opinions.

Petitioner's statement of facts contains several allegations that are not true and not supported by record evidence.

## ARGUMENT

### I.

### PETITIONER FAILED TO RAISE ANY FEDERAL ISSUE IN THE STATE COURTS.

"It is well-settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.' " *Board of Directors of Rotary Inter-*

*national v. Rotary Club of Duarte,* 481 U.S. 537, 550 (1987), *quoting Webb v. Webb,* 451 U.S. 493, 496-97 (1981). Here, petitioner never raised below the federal issue which she now urges this Court to decide. Accordingly, the petition for writ of certiorari must be denied.[5]

The petition identifies as the sole federal question the issue whether the Supreme Court of Pennsylvania's decision violated the "Rule of Law and *stare decisis*" by overturning "years of precedent" (Petition at i), a question which the petition treats as going to the "constitutionality" of the state court's conduct. (*Id.* at 2.) Assuming for the moment that the decision below overturned precedent, and that overturning a state law precedent could conceivably rise to the level of a violation of the United States Constitution, the petition would nonetheless fail because no federal constitutional issue was ever argued or presented to the state courts.

Petitioner filed an Application for Reargument with the Pennsylvania Supreme Court following the decision of which she complains. (R.A. 4a.) In that Application, petitioner did assert the argument that the Pennsylvania Supreme Court's decision violated *stare decisis.* However, petitioner never identified the United States Constitution as a source of law that had been violated, and did not cite a single federal case in her Application. Rather, the entire reargument petition was cast in terms of state law. Given these facts, petitioner failed to pre-

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[5] In violation of Rule 14(h) of the Rules of the Supreme Court, petitioner has failed to identify where in the state court proceedings she raised the alleged federal question that is the subject of her petition.

serve the alleged federal constitutional issue for this Court's review. *Bankers Life and Casualty Co. v. Crenshaw,* 486 U.S. 71, 79-80 (1988); *Board of Directors of Rotary International, supra,* 481 U.S. at 550 & n.9.

## II.

## THIS COURT LACKS JURISDICTION TO REVIEW THE DECISION OF THE PENNSYLVANIA SUPREME COURT, SINCE PETITIONER HAS FAILED TO IDENTIFY A FEDERAL QUESTION.

This Court has certiorari jurisdiction to review state court decisions only where a federal question is involved. 28 U.S.C. §1257(a). In this case, no jurisdiction exists, since the only federal question identified by petitioner – whether the Pennsylvania Supreme Court failed to observe *stare decisis* – does not raise a federal question.

The fundamental problem with petitioner's attempt to invoke this Court's certiorari jurisdiction is her inability to show that a state court's departure from *stare decisis* on a matter of state law constitutes a violation of the United States Constitution.

This Court has repeatedly held that no constitutional violation occurs when a state court overrules a prior precedent. *See, e.g., Great Northern Ry. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 364, 366 (1932); *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 680-81 (1930); *Willoughby v. City of Chicago,* 235 U.S. 45, 50 (1914); *Patterson v. Colorado,* 205 U.S. 454, 460-61 (1907); *Central Land Company of West Virginia v. Laidley,* 159 U.S. 103, 112 (1895). As Justice Brandeis explained: "the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not

give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court." *Brinkerhoff-Faris Trust & Savings Co., supra,* 281 U.S. at 680 (footnote omitted).[6] "State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties . . . ." *Id.*, 281 U.S. at 682 n.8.

In the words of Justice Holmes: "There is no constitutional right to have all general propositions of law once adopted remain unchanged." *Patterson, supra,* 205 U.S. at 461. "[I]n general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed." *Id.*

In short, this Court is "not at liberty, for anything contained in the Constitution of the United States, to thrust upon [state] courts a different conception either of the binding force of precedent or of the meaning of the judicial process." *Great Northern Ry. Co., supra,* 287 U.S. at 366 (Cardozo, J.).

The petition for writ of certiorari is accordingly doomed for failure to raise a federal question. *Stare decisis* is not a federal constitutional doctrine that constrains the decisions of state courts on matters of state law. Even assuming that the Pennsylvania Supreme

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[6] Petitioner, it should be noted, does not contend that she relied to any extent on the 1989 *Dercoli* decision, nor could she. Petitioner commenced this litigation in 1986, based on events that occurred in 1980-82. *Dercoli* was not decided until 1989. Petitioner did not contend that Keystone had breached its so-called duty of good faith and fair dealing until this case was pending on appeal from the trial court's grant of summary judgment, after *Dercoli* was decided.

Court "violated" *stare decisis* by overruling a prior decision, no federal question reviewable by this Court would be presented. And, in the absence of a federal question, this Court lacks jurisdiction to review the final decision of a state court. *Brinkerhoff-Faris Trust & Savings Co., supra,* 281 U.S. at 680.[7]

## III.
## THE PENNSYLVANIA SUPREME COURT'S DECISION WAS CONSISTENT WITH *STARE DECISIS.*

As shown above, petitioner did not raise her purported federal issue in the state courts, and the issue does not present a federal question in any event. However, even if it were assumed that petitioner could overcome these hurdles, her petition would have to be denied because her premise is false – the Pennsylvania Supreme Court in this case did not overrule its prior decision in *Dercoli.*

In *Dercoli,* the plaintiff sued two automobile insurers for damages for breach of an alleged duty of good faith and fair dealing. In her complaint, Mrs. Dercoli alleged that she had been severely injured in an automobile accident in which her late husband had been at fault. She further alleged that the insurer defendants had told her that she did not need to retain counsel, and that they would ensure that she received everything to which she was entitled. (A. 8a.)

---

[7] Petitioner complains that the three justices who dissented in *Dercoli* in 1989 comprised a majority in this case, decided five years later. However, nothing in the United States Constitution prescribes the minimum number of judges for valid state court decisions. And, as noted in the text, there is no constitutional impediment to a state court reversing its direction.

While the insurers were adjusting Mrs. Dercoli's claims, the defense of interspousal immunity was abolished by the Pennsylvania Supreme Court. This meant that Mrs. Dercoli had a viable tort claim for negligence against her late husband's estate which was unquestionably covered by the insurance policies' liability coverage. Notwithstanding this fact, the insurers did not advise Mrs. Dercoli of the potential tort claim or of the fact that the claim was clearly covered by the policies. (*Id.*)

On appeal to the Pennsylvania Supreme Court, the *Dercoli* case elicited three separate opinions. Four justices voted in favor of the plaintiff, deciding that her complaint was sufficient to withstand the state procedural equivalent of a motion to dismiss for failure to state a claim. Three justices dissented. In a concurring opinion that commanded the allegiance of two justices of the four-justice majority, Justice Papadakos emphasized that the insurers had "knowingly and purposefully talked the widow out of seeking independent legal counsel" and had therefore "voluntarily placed themselves in the position of protecting the widow and obtaining for her all benefits that were reasonably due under the facts and state of law known to the insurers." *Dercoli, supra,* 520 Pa. at 482, 554 A.2d at 911. Justice Papadakos stressed that the Court's decision would not impose an affirmative duty on insurers: "On the contrary," he stated, "in this case the insurers themselves voluntarily transformed themselves into legal advisors to the widow." *Id.*

In the present case, the Pennsylvania Supreme Court did not overrule its prior decision in *Dercoli.* On the contrary, the Court made a "determination that [*Dercoli*] is not applicable to the instant case." (A. 4a.) The Supreme Court agreed with Keystone that the

Superior Court had "misinterpreted this Court's holding in *Dercoli* and applied it to a situation which is factually distinguishable." (*Id.*)

Specifically, the Pennsylvania Supreme Court held that the Superior Court was mistaken in thinking that *Dercoli* "impose[d] an affirmative duty upon an insurer to advise and inform an insured of all potential claims when the insurer assumes the responsibility for processing the claim." (A. 7a.) The Court characterized what the Superior Court had done as "erroneously interpret[ing] and impermissibly expand[ing] our limited holding in *Dercoli* beyond its natural bounds . . . ." *Id.*

The Supreme Court in this case not only declined to overrule *Dercoli,* it relied on *stare decisis* and several prior precedents in reaching its decision to reinstate the judgment in favor of Keystone. The Court cited favorably its "factually similar" decision in *Taglianetti v. Workmen's Compensation Appeal Board,* 503 Pa. 270, 469 A.2d 548 (1983). (A. 9a.) In that case, the Court had declined "in the absence of evidence of fraud, intentional deception, or the making of misleading statements," to impose an "affirmative duty to apprise a compensation claimant of any or all available benefits." (A. 10a.)

The Court also "reaffirmed [its] earlier rulings" in *D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Company,* 494 Pa. 501, 431 A.2d 966 (1981), and *Smith v. Harleysville Insurance Company,* 494 Pa. 515, 431 A.2d 974 (1981), "where [it] declined the opportunity to create a judicial remedy for bad faith conduct which occurs under the No-Fault Act." (A. 11a-12a.) In addition, the Court relied upon its prior decision in *Sachritz v. Pennsylvania National Mutual Casualty Insurance Co.,* 500 Pa. 167, 455 A.2d 101 (1982), for

the "fundamental and long-standing rule in Pennsylvania . . . that a lack of knowledge, mistake or misunderstanding does not operate to toll the statute of limitations." (A. 12a.)

In short, far from discarding the rule of *stare decisis*, as petitioner alleges, the Pennsylvania Supreme Court in this case was careful to show that its decision was consistent with its prior precedents. The Court did not overrule *Dercoli*, but simply distinguished it. Thus, even if *stare decisis* were a federal doctrine on the basis of which this Court could review state court decisions in purely state law matters – which it is not – the petition for writ of certiorari should not be granted in this case. The doctrine of *stare decisis* was properly applied in the proceedings below.

## IV.

## THE PETITION FOR WRIT OF CERTIORARI MISSTATES THE RECORD.

The factual assertions contained in the Petition for Writ of Certiorari are nearly all incorrect and not supported by record evidence. Although respondent does not believe that these misstatements of the record are material, respondent is nonetheless obliged to point them out.

It is not true and there is no record evidence that Keystone made an open-ended promise "to pay the no-fault benefits to which [the Millers] were entitled." (Petition at 8.) Keystone's "promises" to John Miller were set forth in their entirety in the insurance policy Keystone issued to him. The policy was never introduced into the record by petitioner.

It is not true and there is no record evidence that petitioner "was determined to be a dependent sur-

vivor," if what is meant by that is a judicial determination. While it is true that Keystone treated petitioner in her individual capacity as a dependent survivor, and paid her $5,000 in survivor's loss benefits, the issue of petitioner's status as a dependent survivor was never litigated. Moreover, the state courts determined that petitioner instituted this action solely in her capacity as the administratrix of her son's estate, and not in her capacity as her son's survivor. (A. 25a-26a, n.2.)

It is not true and there is no record evidence that petitioner "filed a claim form that said Keystone would pay the no-fault benefits to which she was entitled." (Petition at 8.) The claim form filed by petitioner was never submitted into evidence.

Finally, it is not true and there is no record evidence for petitioner's statement that "Keystone chose as its corporate policy *not* to pay [work loss benefits] unless specifically requested and *not* to tell insureds of their entitlement." (Petition at 8 (emphasis in original).) Moreover, at the time Keystone was interacting with petitioner, between August, 1980 and April, 1982, no published Pennsylvania appellate decision had held that estates were entitled to post-mortem work loss benefits. (A. 13a, n.10.)

## CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

JEFFREY A. LESS
*(Counsel of Record)*
A. RICHARD FELDMAN
BAZELON & LESS
1515 Market Street
7th Floor
Philadelphia, PA 19102
(215) 568-1155
*Attorneys for Respondent, Keystone Insurance Company.*

## APPENDIX A

ARTHUR REEHER COMPANY, INC.

*Executive Offices*
5721 JONESTOWN ROAD
P.O. Box 6215, HARRISBURG, PA 17112
PHONE (717) 545-3726

Please Reply To:
ARTHUR REEHER CO.
P.O. BOX 385
YORK, PA 17405

| | |
|---|---|
| Your Claim No. | Unknown |
| Our File No. | 02-ACI-7649 |
| Policy No. | 48105455 |
| Assured | Miller, John R. |
| Claimant | Danner, Donald K. |
| D/L | 8-12-80 |
| Type of Loss | Double Fatality |

Date: 10-21-80

TO: Keystone Insurance Company
1401 West Mt. Royal Avenue
Baltimore, MD 21201

ATTN: MR. SAL LIBERTO,
CLAIMS MANAGER

Dear Mr. Liberto:

This will supplement our previous report dated 10-10-80 and acknowlege our Harrisburg Branch cc of 10-16-80, and our phone conversation of 10-20-80 along with serving as our closing report.

As you have indicated in our telephone conversation of 10-20-80 that Mary Miller (mother of the deceased insured) would be entitled to survivors benefits which according to your Philadelphia office would involve a monthly check of $135.00 until the $5,000 survivors benefit is exhausted we have notified Mrs. Miller that she will be receiving monthly payments shortly in that regard. In addition, we made no mention to Mrs. Miller as discussed pertaining to possible benefits for lost wages and will merely await developments in that regard.

In light of the above, our activity in the York area would now appear to be complete while our Harrisburg Branch follows further in their investigation and handling. Thereofre, we are taking the liberty of retirring out file and submitting our service invoice for your consideration.

We again thank-you for allowing us to be of service, and of course will retain this file in the event that we can be of any further service in this area.

Very truly yours,

ARTHUR REEHER COMPANY

/s/ Joseph C. Kozlowski
Joseph C. Kozlowski
Adjuster

CONFIDENTIAL
John R. Miller, Dec.
Exhibit # 1

Enclosure: 1. One service invoice

cc: Harrisburg Branch Arthur Reeher Company
Your File #: 01-AP-14376
ATTN: MR. PAUL R. GREEN

RECORD OF P.I.P. PAYMENTS

Claim #_____Case # _____ Victim's Name _____ Date of Acc. _____

| MEDICAL | | WAGES | | ESSENTIAL REPLACEMENT SERVICES | | PAYEE WAGE PERIOD |
|---|---|---|---|---|---|---|
| PAID | RESERVE | PAID | RESERVE | PAID | RESERVE | |
| XXXX | 250 | XXXX | | XXXX | 6500 | |
| | | | | 1500 | 5000 | Funeral Ex. |
| 10-20-80 | | | | 270 | 4730 | Ins. |
| 12-2-80 | | | | 540 | 4190 | Ins. |
| 1-21-81 | | | | 540 | 3650 | " |
| | | | | 540 | 3110 | Ins. |
| 5-20-81 | | | | 540 | 2570 | " |
| 7-30-81 | | | | 540 | 2030 | " |
| 9-23-81 | | | | 540 | 1490 | " |
| 11-24-81 | | | | 540 | 950 | " |
| 1-31-82 | | | | 540 | 410 | " |
| 4-30-82 | | | | 410 | 000 | |

CONFIDENTIAL
John R. Miller, Dec.
Exhibit # 2

APPENDIX B

## APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 84 M.D. APPEAL DOCKET, 1991
J-172-1992)

MARY C. MILLER, Administratrix of the
Estate of JOHN R. MILLER, Deceased
and all others similarly situated,

Appellees,

v.

KEYSTONE INSURANCE COMPANY,

Appellant

APPELLEES' APPLICATION FOR REARGUMENT

Appeal from the Judgment entered January 8, 1991,
by the Superior Court of Pennsylvania, No. 00304
NBG 1989, Vacating the Judgment dated June 2, 1989,
by the Court of Common Pleas of Dauphin County,
Pennsylvania in No. 26 S 1987, and Remanding
for Further Proceedings

RICHARD C. ANGINO, Esquire
I.D. No. 07140
ANGINO & ROVNER, P.C.
4503 North Front Street
Harrisburg, PA 17110
(717) 238-6791

Attorneys for Appellees

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I. [1]

**3-2 SUPREME COURT DECISION.**

The Order of Superior Court vacating the Order of the trial court is reversed and the Order of the Court of Common Pleas for Dauphin County granting Appellant's motion for Summary Judgment on June 2, 1989, is reinstated.

Mr. Justice Larsen *did not participate* in the consideration or decision of this case.

Mr. Justice McDermott *did not participate* in the decision of this case.

Mr. Justice Cappy files a Dissenting Opinion in which Mr. Justice Papadakos joins.

DATED: JANUARY 31, 1994
JUDGMENT ENTERED:

/s/ Shirley Bailey
CHIEF CLERK

(Emphasis supplied)

A copy of your Court's Opinion dated January 31, 1994, is attached as Exhibit "A".

A copy of the Superior Court's decision dated January 8, 1991, reported at 402 Pa. Super. 213, 586 A.2d 936 (1991) is attached as Exhibit "B"; the trial court's Opinion and Order dated June 2, 1989, is attached as Exhibit "C".

A copy of *Dercoli v. Pennsylvania Nat. Mut. Ins. Co.*, 520 Pa. 471, 554 A.2d 906 (1989) is attached as Exhibit "D" and the Superior Court's decision in *Banker v. Valley Forge Ins. Co.*, 401 Pa. Super. 367, 585 A.2d 504 (1991), *alloc. denied* 529 Pa. 615, 600 A.2d 532 (1991) is attached as Exhibit "E".

II. [2]

**POINTS OF LAW OR FACE OVERLOOKED OR MISAPPREHDED BY A THREE PERSON MAJORITY OF YOUR COURT.**

A. Principle of Stare Decisis.

Less than four years ago, a Majority of Your Court consisting of Justices McDermott, Papadakos, Larson and Stout held in *Dercoli v. Pennsylvania Nat. Mut. Ins. Co.*, 520 Pa. 471, 554 A.2d 906 (1989) that a first party carrier, the insured's own carrier, is liable when it fails to "deal with the [insured] on a fair and frank basis, and at all times, to act in good faith." According to the Majority in *Dercoli,* the insurer failed in its "duty of full and complete disclosure as to all of the benefits and every coverage that is provided by the applicable policy or policies along with all requirements, including any time limitations for making a claim." *Dercoli,* 554 A.2d at 909. *Also see,* Justice Papadakos, concurring opinion, 554 A.2d at 911 in which Justice McDermott joined.

Justice *Flaherty* dissented:

> I dissent. *Until today* an insurance company on the facts pleaded in this case has had no *fiduciary* duty to an insured, *even when it advised its insured that he does not need a lawyer.* But if, under the *guise of "fair dealing and good faith,"* we are *now* to decide that insurance companies have *a fiduciary duty* to advise of *every possible claim,* surely insurance companies will cease even to talk to claimants for fear of breaching this new judicially declared duty.
>
> * * *

As much as we all would like to see unfortunate victims of automobile accidents compensated fully,

> *such compensation cannot be achieved at the cost of dismantling the insurance industry. It has always been the case that insurance companies, insureds and claimants are potential adversaries.* [3]

*Dercoli,* 554 A.2d at 911-912 (Emphasis supplied) (*Zappala,* J., joins in this Dissenting Opinion; *Nix,* C.J. separately dissented).

Less than four years later in the instant case, with Justice Larson and Justice McDermott not participating, *the Dercoli dissent of three has become a majority of three.* The legal principle of "stare decisis," the adherence to precedent, requires that the rule of law should not change so quickly merely because half of the Majority in *Dercoli* did not and/or could not participate in the instant case. Because of the importance of this issue for all insurance consumers in Pennsylvania, reargument should be granted so that the *full* court can decide the direction of insurance law in Pennsylvania.

**B. Despite Justice Flaherty's statement in his *Dercoli* dissent, insurance companies have always had a fiduciary duty to their insured.**

Long before the legislative mandates established in the No-Fault Act and accompanying Insurance Department Regulations, Your Court consistently recognized an insurer's important duty of fair dealing toward an insured. Your Court, more than half a century ago, declared in *Fedas v. Ins. Co. of the State of Penna.,* 300 Pa. 555, 151 A. 285 (1930):

> The utmost fair dealing should characterize the transactions between an insurance company and the insured. If the insurer, having knowledge of a loss, by any act throws the insured off his guard as to the necessity of performing some duty enjoined by

> the policy, the insurer should not be permitted to take advantage of the failure to act. [4]

*Fedas,* 300 Pa. at 559.

The duty of "utmost fair dealing" was repeatedly expressed by Your Court in cases which followed *Fedas. See, Cowden v. Aetna Casualty and Surety Co.,* 389 Pa. 459, 470, 134 A.2d 223 (1957) ("the insurer must accord the interest of its insured the same faithful consideration it gives its own interest"); *Gideon v. State Farm Mut. Auto. Ins. Co.,* 410 Pa. 55, 59, 188 A.2d 320 (1963) ("the insurer assumes a fiduciary position towards the insured and becomes obligated to act in good faith and with due care in representing the interests of the insured"); *Gray v. Nationwide Mut. Ins. Co.,* 422 Pa. 500, 504, 223 A.2d 8 (1966) ("the insurer assumes a fiduciary position towards the insured and becomes obligated to act in good faith and with due care in representing the interests of the insured"); *Dercoli v. Pennsylvania National Mut. Ins. Co.,* 520 Pa. 471, 554 A.2d 906, 909 (1989) (it has long been recognized that "the utmost fair dealing should characterize the transactions between an insurance company and the insured").

The decision of the three-justice Majority in the instant action vitiates the long years of precedent set forth above by requiring that the insurer make "knowing and purposeful misrepresentations" and undertake to act "as the insured's counsel" before any breach of duty occurs. *See,* Slip Opinion, p. 7 (attached as Exhibit "A").

**C. The legislature, by passing the Pennsylvania No-Fault Act, mandated that insurance carriers assume a fiduciary responsibility to their insureds and pay them all benefits to which they are entitled.** [5]

A basic tenet of statutory construction is that judges and justices must put aside their own philosphies and follow the public policy of the community as expressed in the constitution, legislation, and established precedent. Judges and justices may have the power when they cease to be a minority and become a majority, but they do not have the right to ignore legislative intent and public policy expressed in properly-passed statutes. The Statutory Construction Act, 1 Pa. C.S.A. §1901, *et seq.*, demands that courts seek out and follow the legislative intent in all statutory construction.

The particular statute involved in this case is the now-repealed No-Fault Motor Vehicle Insurance Act, 40 P.S. §1009.101, *et seq.* The expressed Findings and Purposes included:

> (a) Findings–
>
> * * *
>
> (3) the maximum feasible restoration of all individuals injured and compensation of the economic losses of the survivors of all individuals killed. . . .
>
> * * *
>
> (5) exhaustive studies . . . have determined that the present basic system of motor vehicle accident and insurance law . . . is not such a low-cost, comprehensive, and fair system;
>
> (6) careful studies . . . have demonstrated that a basic system . . . which:

> (A) assumes every victim payment of all his basic medical and rehabilitation costs, and recovery of a reasonable amount of work loss . . . is such a low-cost . . . system; [6]
>
> * * *
>
> (b) Purpose. – Therefore, it is hereby declared to be the policy of the General Assembly to establish . . . a Statewide system of prompt and adequate basic loss benefits for motor vehicle accident victims and the survivors of deceased victims.

40 F.S. §1009.102.

The innovative insurance scheme contemplated by the legislature and enacted in 1974 *envisioned a system whereby an insured and his insurer were partners, not adversaries.*

Following the passage of the No-Fault Act, the Pennsylvania Insurance Department, by regulation, mandated that all insurance companies and their insureds the following notice:

> C. LAWSUITS.
>
> You will not need a lawyer to collect your No-Fault benefits. If you are injured, [contact your insurance company or your insurance agent] to get claims forms. You should be paid within 30 days after the company receives completed forms from all related parties (you, your employer, the hospital, etc.).

31 Pa. Code §66.4, Transition Procedures.

After an accident when the insured went to his insurer in person or by phone, he was given an application to complete that stated at the top:

TO ENABLE *US TO DETERMINE IF YOU ARE ENTITLED TO BENEFITS* UNDER THE PERSONAL INJURY PROTECTION LAW, *PLEASE COMPLETE THIS FORM AND RETURN IT PROMPTLY.*

No-Fault Application, Exhibit "F" (Emphasis supplied).

The application that the insured completed unequivocally stated that it was the responsibility of the insurance carrier – "*us* . . . to determine if *you* are entitled to benefits under the Personal Injury Protection Law." [7]

Although Justice Flaherty in his *Dercoli* dissent references the mandated notice that insureds *will not need to consult lawyers,* he goes on to answer that insureds should realize that they needed lawyers because insurance companies are their enemies. This may be Justice Flaherty's philosophy, but it certainly was not the legislative intent.

The No-Fault Act was designed to revolutionize the prior adversarial relationships between insurer and insured. No longer were claimant and company to be enemies. Instead, they were to be partners, with claimant providing basic information and insurer deciding the benefits due and paying them. Nor did the insured have to make a claim for each individual category of benefits he sought. The application asked for basic information, but it did not include any space where the insured had to denominate the benefits for which he was making a claim. That responsibility was on the insurer. In fact, Section 106(a)(5) affirmatively required that insurance carriers who were going to deny benefits to which the insureds might be entitled must "give to the claimant written notice of the rejection promptly, but in no event more than thirty days after the receipt of reasonable proof of the loss" 40 P.S. §1009.106(a)(5).

Further, the No-Fault Act incorporated penalty provisions, including counsel fees, 40 P.S. §1009.107, and interest, 40 P.S. §1009.106(a)(2), to sanction insurance carriers that did not perform their statutorily mandated duties. [8]

There is no question, therefore, that the *Dercoli* three-member Minority that is the present three-member Majority in this case *is clearly wrong in holding that an insurance carrier does not have an affirmative duty to pay benefits and inferentially advise its insured as to his or her right to such benefits.*

**D. The *Dercoli* Minority/present Majority misapprehended the facts and law in their holding that Mrs. Miller, from 1980 through 1984, had only a *potential* right to obtain work loss benefits.**

The federal studies, proposed federal act, other studies and various state experiments references in the No-Fault Act virtually all provided for "work loss" benefits to be paid to survivors of deceased victims. The Pennsylvania No-Fault Act defines "work loss" as "loss of gross income of victim"; "victim" includes all who sustain injuries including "deceased victim"; and "injury" includes death (*see,* Section 103, "Definitions").

The Superior Court in 1979, with one dissent, and Your Court unanimously on September 22, 1980, held in two consolidated cases that *survivors and estates* of deceased victims were entitled to "work loss" benefits. *Heffner v. Allstate Ins. Co.*, 265 Pa. Super. 181, 401 A.2d 1160 (1979), *aff'd,* 491 Pa. 447, 421 A.2d 629 (1980) and *Pontius v. U.S.F.&G.*, No. 2702 S 1977 (C.P. Dauph.), *reversed* by the Superior Court to No. 80 March Term, 1978 (unreported), *aff'd,* 491 Pa. 447, 421 A.2d 629 (1980).

In the instant case, Mrs. Miller lost her son. Keystone paid survivor's loss benefits to her based on her dependency on her son. There is, therefore, no question that when Mr. Miller applied for benefits and gave a statement to Keystone in October, 1980, *she was entitled, and the insurance company knew she was entitled, to "work loss" benefits.* [9]

Present counsel, anticipating that insurance carriers would not perform their legislatively mandated duty to inform and pay benefits, in 1979 commenced a class action entitled *Nye v. Erie Ins. Exchange,* No. 5349 S 1979 (C.P. Dauph.), 307 Pa. Super 464, 453 A.2d 677 (1982), 504 Pa. 3, 470 A.2d 98 (1983), which included 31 of the larger insurance companies in Pennsylvania *including Keystone Ins. Co.,* the Defendant in the instant case. Although successful before the Superior Court, Your Court held that *Nye* did not have standing to sue any carrier other than his own.

As counsel anticipated, the Defendant in this case followed a *policy of keeping secret* from its insureds *their right to $15,000 of work loss* and, obviously, not voluntarily paying same *See,* Confidential Memo referenced on page 3 of Majority Opinion (Exhibit "G") which states:

> "In addition, we made no mention to Mrs. Miller as discussed pertaining to possible benefits for lost wages and will merely await developments in that regard."

Although Keystone and the majority in this case reference *Freeze v. Donegal Mut. Ins. Co.,* 504 Pa. 218, 470 A.2d 959 (1983) for the proposition that the law was uncertain until *Freeze,* it is clear that the law *was unequivocal as to survivors and estates of deceased victims where there was dependency in 1980,* and *Freeze* merely [10]

confirmed that the law *also* applied to 11-year-old children who were not in the work force.

What Keystone did in the instant case amounts to fraud. Although Keystone entered into a contract with Mr. Miller to pay the benefits due, and although Mrs. Miller signed a claim form which had a heading that Keystone would determine and pay the benefits to which she was entitled, Keystone kept Mrs. Miller's money as it might have kept her money from an overpayment of premium or by failing to pay medical bills or funeral expenses. Do not insurance companies, like tellers at banks, clerks at department stores, and/or sellers of goods, have a legal duty to provide benefits, goods or services for money paid? Does the Supreme Court intend to sanction the retention of money, goods, services or benefits so long as the insured, customer or client does not realize that he is entitled to same? Would such a requirement of good faith or honesty result in the "dismantling of the insurance industry"? (Justice Flaherty's dissent in *Dercoli*). Are not insurance companies in business to pay benefits?

The Majority on numerous occasions draws significance from its own conclusion that the insured only had "potential claims"[1] for post mortem work loss benefits [11] where, in reality, there is no doubt that *in 1980, and for the next four years until the statute of limitations expired,* Mrs. Miller had a *real* claim.

Repeating the word "potential" as the Majority does cannot change the fact that Mrs. Miller was entitled to

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[1] *See,* Slip Op. p. 3 ("potential entitlements" and "possible wage loss benefits"); p. 3 n.2 ("possible benefits for lost wages); p. 5 ("potential claims," "potentially entitled," and "knowledge of the possibility"), p. 6 ("potential claims"), p. 10 ("any or all available benefits"); p. 11 ("potentially entitled").

work loss benefits *and only the statute of limitations precludes her from recovering same.* The statute of limitations was intended to protect defendants who are not aware that they did something wrong or might be called upon to defend themselves for something that happened years before of which they had no notice. The statute of limitations was not intended to protect a carrier that knew it had a responsibility to provide benefits for premiums received and who, instead, perpetrated a fraud upon its insured.

**E. The three-justice Majority in the instant case misapprehended the legal distinction between the duty owed by a third party carrier or one's employer and the duty that an insurer owes to its own insured.**

There has always been a distinction between the duty that an insurance carrier owes to its own insured and the absence of any duty to third parties. Prior to the passage of the No-Fault Law, when an individual was injured or killed in a motor vehicle accident, it was generally the tortfeasor or third party carrier that had the responsibility to pay medical bills, property damage, funeral bills, and lost wages. There was no question that such a carrier was an adversary, and there was a need to hire one's own attorney to represent oneself. [12]

The No-Fault Act, however, changed the situation so that an insured went to and recovered substantial benefits from his own insurance carrier, was told that he did not need a lawyer in dealing with his own carrier, and that his own insurance company would provide any and all benefits to which the insured was entitled.

The three-justice Majority, by relying upon *Taglianetti v. Workmen's Compensation App. Bd.*, 503 Pa. 270,

469 A.2d 548 (1983) misapprehends that the relationship between an insured and insurer is vastly different than that between employee and employer.

In *Taglianetti,* an unidentified female in the personnel office of the University of Pennsylvania Hospital misinformed the surviving widow of a deceased employee that, apart from life insurance and the death gratuity, she had no othe widow's benefits. *Taglianetti,* 469 A.2d at 549-550. The information turned out to be incorrect because the surviving widow was entitled to Workers' Compensation death benefits under 77 P.S. §602. *Taglianetti,* 469 A.2d at 549. Your Court in *Taglianetti,* citing exclusively Workers' Compensation cases and statutes, concluded that because there was no evidence that the unidentified female in the personnel office "intentionally deceived" the surviving widow and because the surviving widow's attorney conceded that an employer has no affirmative duty to provide information of possible benefits, it would not "impose a duty upon an *employer* where none exists." *Taglianetti,* 469 A.2d at 550. [13]

The present case is not a Workers' Compensation case, an employment case, nor any other third party insurance or relationship type case. It is a no fault/first party case and, under such cases, an insurance carrier has a fiduciary duty to its insured.

**F. The holding in this case not only is contrary to Your Court's prior holdings as to first party insurance law, but also will have far-reaching application in many other insurance cases with catastrophic results.**

Although the legislature repealed the No-Fault Law, it adopted in 1984 and amended in 1990, the Motor Vehicle Financial Responsibility Law, 75 P.S. §1701, et *seq.*, (MVRFL). The MVFRL continues to require a close relationship between an insured and insurer in obtaining first party benefits which include medical expenses, wage losses, funeral expense, death benefits, and uninsured and underinsured motorist coverage. The legislature requires that insurance carriers provide their insureds with Section 1791 "important notices" to advise their insureds as to their potential rights to purchase coverage. Insurance carriers must explain coverages and obtain signatures and dates to specific forms to select limited tort, reject ininsured/underinsured coverage or stacking of same. *See, e.g.*, Section 1731, 1738. *Also see,* Section 1734 requiring a written waiver, particularly under the 1984 law. Surely, the three-justice decision in this case flies in the face of such legislation. [14]

The Superior Court recently decided *Banker v. Valley Forge Ins. Co.*, 401 Pa. Super. 367, 585 A.2d 504 (1991), *alloc.denied,* 529 Pa. 615, 600 A.2d 532 (1991), that emphasizes the duty of an insurance company to deal with an insured fairly and in good faith, which *includes the duty of full and complete disclosure as to all of the benefits and every coverage that is provided by the applicable policy or policies.*

The decision of the three-member Majority in this case gives a clear signal to insurers that they should merely

accept claims information, pay some *nominal* amount, and sit back and wait for the statute of limitations to run. Unsophisticated consumers will, like Mrs. Miller, assume they have received all to which they are entitled. Others will hire attorneys to litigate their claims; clogging out already over-crowded court system. The effects will be felt in all areas of insurance – life, health, homeowners, fire and theft, and automobile. What the Majority does in *this case* is give a license to insurers to ignore insurance statutes and contractual obligations in favor of higher profits for insurance companies and illusory coverage for everyone. Reargument before the *full* court is essential to correct this outrageous decision that may affect every man, woman and child in Pennsylvania.

## IV. CONCLUSION [15]

In *1980,* Keystone received premiums from the Millers and, in return, promised to pay the no-fault benefits to which they were entitled. Your Court unanimously decided *Heffner* and *Pontius,* holding that dependent survivors were entitled to receive post mortem work loss benefits. Mr. Miller died and Mrs. Miller was determined to be a dependent survivor. She filed a claim form that said Keystone would pay the no fault benefits to which she was entitled. Knowing from *Heffner, Pontius* and *Nye* that Mrs. Miller was entitled to post mortem work loss benefits, Keystone chose as its corporate policy *not* to pay same unless specifically requested and *not* to tell insureds of their eneitltment. Keystone closed its file, waited four years and claimed the statute of limitations as a defense. That is out and out fraud in

addition to the breach of its statutorily mandated duty. Your Court cannot sanction such conduct and should grant reargument.

Respectfully submitted,

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Dated: February 10, 1994

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT
NO. 84 M.D. APPEAL DOCKET, 1991

MARY C. MILLER, Administratrix of
the Estate of JOHN R. MILLER, Deceased
and all others similarly situated,

Appellees

v.

KEYSTONE INSURANCE COMPANY,

Appellant

PROOF OF SERVICE

I hereby certify that on this 10th day of February, 1994, a true and correct copy of the foregoing PETITION FOR REARGUMENT was served upon the following persons and in the manner indicated below which services satisfies the requirements of Pa. R.A.P. 121:

*Service by First Class United States Mail,*
*postage prepaid:*

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